

## Tilburg University

### Empty promises

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## **Empty Promises?**

Compliance with the Human Rights Framework  
in relation to Female Genital Mutilation/Cutting in Senegal

The field research in Senegal was financially supported by McKinsey & Company, Tilburg Law School (Alumni) Fund and Special Data Collection Requests (BAD) Fund of Tilburg Law School.

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Image taken on 24 November 2013 during a Public Declaration against Female Genital Mutilation/ Cutting and child/forced marriage in Médina Yoro Foulah, Senegal. The two young women were aware of this picture being used to visually illustrate the Public Declaration. The image is publicly available at: <http://aliciafield.co.uk/project/excision05/>.

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# **EMPTY PROMISES?**

## **Compliance with the Human Rights Framework in relation to Female Genital Mutilation/ Cutting in Senegal**

### **PROEFSCHRIFT**

ter verkrijging van de graad van doctor aan  
Tilburg University op gezag van de  
rector magnificus, prof. dr. E.H.L. Aarts,  
in het openbaar te verdedigen ten overstaan van een  
door het college voor promoties aangewezen commissie  
in de aula van de Universiteit  
op vrijdag 18 maart 2016 om 14:15 uur

door

**MARIA JOHANNA MIDDELBURG**

geboren op 28 maart 1986 te Delft

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prof. dr. K. de Feyter  
dr. N.J. Diop

## PARANIMFEN

Eefje de Volder  
Marloes van Rijsbergen

*I dedicate this book to every girl and every woman who has to live  
with the consequences of Female Genital Mutilation/Cutting*



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*Part IV - Conclusions*

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## LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACmHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AJS	Senegalese Association of Jurists ( <i>Association des Juristes Sénégalais</i> )
AU	African Union
AYC	African Youth Charter
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CATCee	Committee against Torture
CED	Committee on Enforced Disappearances
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEDAWCee	Committee on the Elimination of Discrimination Against Women
CEP	Community Empowerment Program
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CMW	Committee on the Protection of the Rights of All Migrant Workers and Members of their Families
CoE	Council of Europe
CRPD	Convention on the Rights of Persons with Disabilities
CRPDCee	Committee on the Rights of Persons with Disabilities
CRC	Convention on the Rights of the Child
CRCee	Committee on the Rights of the Child
CSDH	Senegalese Human Rights Committee ( <i>Comité Sénégalais des Droits de l'Homme</i> )
CSI	Civil Society Index
CSO	Civil Society Organization
CSW	Commission on the Status of Women
DARSIWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts
DEVAW	Declaration on the Elimination of Violence Against Women
DHS	Demographic and Health Surveys
DI	Democracy Index
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
FC	Female Circumcision

## List of Abbreviations

FGC	Female Genital Cutting
FGM	Female Genital Mutilation
FGM/C	Female Genital Mutilation/Cutting
FGS	Female Genital Surgery
FHI	Freedom House Index
GA	General Assembly
GC	General Comment
GDP	Gross Domestic Product
GR	General Recommendation
HRC	Human Rights Committee
IAC	Inter-African Committee on Traditional Practices Affecting the Health of Women and Children
ICCPR	International Covenant on Civil and Political Rights
ICCPR-OP 1	Optional Protocol to the International Covenant on Civil and Political Rights
ICCPR-OP 2	Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty
ICED	International Convention for the Protection of All Persons from Enforced Disappearance
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPD	International Conference on Population and Development
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IL	International Law
ILC	International Legal Compliance
IO	International Organization
IR	International Relations
MDGs	Millennium Development Goals
MICS	Multiple Indicator Cluster Surveys
NAP	National Action Plan
NHRI	National Human Rights Institutions
OAU	Organisation of Africa Unity
OHCHR	Office of the High Commissioner for Human Rights
OP-CAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
OP-CEDAW	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women
OP-CRC-AC	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict
OP-CRC-IC	Optional Protocol to the Convention on the Rights of the Child on a communications procedure
OP-CRC-SC	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

OP-CRPD	Optional Protocol to the Convention on the Rights of Persons with Disabilities
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
SPT	Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
TMB	Treaty Monitoring Body
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV / AIDS
UNCHR	United Nations Commission on Human Rights
UNDP	United Nations Development Programme
UNECA	United Nations Economic Commission for Africa
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFPA	United Nation Population Fund
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNIFEM	United Nations Development Fund for Women
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women
UPR	Universal Periodic Review
VAW	Violence Against Women
WHO	World Health Organization





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# CHAPTER I

## INTRODUCTION

*“Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighbourhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.”*

Eleanor Roosevelt, “In Our Hands”<sup>1</sup>

### 1 INTRODUCTION

The practice of Female Genital Mutilation/Cutting (FGM/C), also known as female circumcision, involves the partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons.<sup>2</sup> The practice is typically performed by traditional practitioners on girls between infancy and the age of 15. The practice of FGM/C has no documented health benefits and leads to serious health consequences. It is believed to be a requirement for marriage and necessary to control women’s sexuality.<sup>3</sup> FGM/C is often an integral part of cultural heritage and a marker of ethnic identity. Although practiced among communities with various religious backgrounds, many practitioners believe that FGM/C is a religious obligation under Islam.<sup>4</sup> FGM/C occurs in a wide variety of cultural contexts, with significant

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<sup>1</sup> Speech delivered on the tenth anniversary of the Universal Declaration of Human Rights (1958). Mrs. Eleanor Roosevelt, the first Chair of the United Nations Human Rights Commission, played a key role in the development of the Universal Declaration of Human Rights.

<sup>2</sup> World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008, p. 4; World Health Organization, *Female Genital Mutilation, Fact Sheet No. 241*, WHO, February 2014, available at <http://www.who.int/mediacentre/factsheets/fs241/en/> [Last Accessed 1 October 2015]. Chapter III, section 2 and 3 will elaborate further on the definition, terminology and classification of FGM/C.

<sup>3</sup> Chapter III, section 9 of this research will provide more information on the reasons and justifications for the practice FGM/C.

<sup>4</sup> However, no reference to the practice is to be found in the Quran. See Chapter III, section 9.3 of this research for more information about FGM/C and religion.

differences in terms of the extent of cutting, the setting in which the practice takes place and the rituals associated with it. The following account is given by a mother (named Kerthio), who testifies how FGM/C was performed on her four-year-old daughter in Senegal:

“A clean straw mat would be laid out in the back courtyard, near where the cooking was done, and the tools readied: cloth, a bar of soap, and a razor blade or knife. The cutter’s assistant would then go and gather goat dung – it was believed that goat excrement had antiseptic qualities – and stir it into a large, metal tub of water, steeped with special leaves and perfume. She’d boil the liquid until the firewood underneath bloomed crimson with heat and the dung had fully dissolved, and then carry the steaming tub to the ground next to the mat, where Kerthio’s daughter waited. Sitting cross-legged at the child’s feet, the cutter would grip the razor blade in her hands. Too large for such a delicate job, the blade would be carefully broken in half. The assistant would grip the child’s arms, pinning them firmly to the ground, as the cutter lifted the young girl’s *pagne*, a traditional wraparound skirt, and spread open her legs. Sure to keep as much pressure as she could on the girl’s arms, the assistant would instruct Kerthio’s daughter to be brave. It will all be over with quickly, she might whisper. And it will all be worth it. Kerthio believed these words. Life was filled with hardships and suffering, especially for women. This was her daughter’s first opportunity to prove to herself, as well as to the community, that she was courageous, that she could endure the excruciating pain so many women like Kerthio knew so well themselves. Kerthio wondered if the assistant would turn aside her gaze as the cutter took the razor blade and, with a few quick cuts, remove the girl’s clitoris and labia. Kerthio might have imagined it, but she could sense her daughter’s screams slicing through the distant, heavy air, scattering the heat and the flies as she was lifted from the mat and placed into the milky dung water, which would quickly turn red with blood. The women would give the water time to clean the wound before lifting the trembling girl back onto the mat and pressing the area with the wet neem leaves they had collected.”<sup>5</sup>

This account of Kerthio is one out of millions. According to United Nations Children’s Fund (UNICEF),<sup>6</sup> an estimated 125 million girls and women have undergone the practice, and 30 million girls are at risk of undergoing FGM/C over the next decade if current trends persist.<sup>7</sup> The practice is, according to UNICEF, concentrated in 27 countries<sup>8</sup> in Africa and two countries in the Middle East (Yemen and Iraq). However, UNICEF has been criticized for failing to address countries in Asia,<sup>9</sup> other countries in the Middle East,<sup>10</sup> and Latin America<sup>11</sup> where the practice is – according to small-scale local research – also

<sup>5</sup> A. Molloy, *However Long the Night: Molly Melching’s Journey to Help Millions of African Women and Girls Triumph*, Harper Collins Publishers, 2013, p. 8-9.

<sup>6</sup> United Nations Children’s Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 3.

<sup>7</sup> *Ibid*, p. 114; United Nations Children’s Fund, *Female Genital Mutilation/Cutting: What Might the Future Hold?*, UNICEF, July 2014, p. 2.

<sup>8</sup> Including Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Côte d’Ivoire, Djibouti, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Togo, Uganda and United Republic of Tanzania.

<sup>9</sup> Including Brunei, India, Indonesia, Malaysia, Maldives, Pakistan, Philippines, Singapore, Sri Lanka, Tajikistan and Thailand.

<sup>10</sup> Including Bahrain, Iran, Israel, Jordan, Kuwait, Oman, Palestinian Territories, Saudi Arabia, Syria, United Arab Emirates and Qatar.

<sup>11</sup> Including Colombia.

prevalent.<sup>12</sup> The total number of girls and women who have undergone FGM/C worldwide is likely to be much higher than the figures of UNICEF show.<sup>13</sup> The practice also became a concern in Europe,<sup>14</sup> the United States, Canada, Australia and New Zealand as a result of international migration from countries where FGM/C is prevalent.<sup>15</sup> Chapter III will further explain what the practice of FGM/C entails.

### 1.1 The practice of FGM/C within the scope of international and regional human rights law

Initially, the practice of FGM/C was placed outside the scope of international and regional human rights law.<sup>16</sup> The practice was widely viewed as a 'private' act and a 'domestic' matter, performed by private individuals (rather than State officials).<sup>17</sup> In addition, the international community was of the opinion that the practice of FGM/C "formed a part of African customs and traditions" with which they "out of respect" did not want to interfere.<sup>18</sup> This changed in the 1990s with the global movement against Violence Against Women (VAW). First, the United Nations (UN) classified FGM/C as a form of VAW with the adoption of Declaration on the Elimination of Violence against Women (DEVAW).<sup>19</sup> Although not legally binding, DEVAW strengthened the growing international consensus that FGM/C of any type is a human rights violation.<sup>20</sup> Second, with the adoption of General Recommendation No. 19<sup>21</sup> on Violence Against Women in 1992, the Committee on the Elimination of Discrimination Against Women (CEDAWCee) explicitly included VAW within the scope of Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>22</sup> and thus falling under international human rights law.<sup>23</sup>

<sup>12</sup> See Chapter III, section 6.2 of this research for more information about the prevalence of FGM/C in Asia, the Middle East and Latin America.

<sup>13</sup> See Chapter III, section 6.4 of this research for a discussion on the FGM/C prevalence data.

<sup>14</sup> European Institute for Gender Equality, *Female Genital Mutilation in the European Union and Croatia*, EIGE Publications Office, 2013.

<sup>15</sup> See Chapter III, section 6.3 of this research for more information about the prevalence of FGM/C in 'the West'.

<sup>16</sup> See Chapter IV, section 4 of this research for more information about the classification of FGM/C as a human rights violation.

<sup>17</sup> B. Shell-Duncan, From Health to Human Rights: Female Genital Cutting and the Politics of Intervention, *American Anthropologist*, Volume 110, No. 2, 2008, p. 227.

<sup>18</sup> A. Martinez and M.E. Stuart, *Out of the Ivory Tower: Feminist Research for Social Change*, Canadian Scholars' Press, 2003, p. 125.

<sup>19</sup> United Nations General Assembly, *Declaration on the Elimination of Violence Against Women*, A/RES/48/104, 20 December 1993, Article 2(a): "Violence against women shall be understood to encompass, but not be limited to, the following: (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation."

<sup>20</sup> E. Leye and M.J. Middelburg, *Female Genital Mutilation in Europe from a Child Right's Perspective*, in: W. Vandenhoe et al., *Routledge International Handbook of Children's Rights Studies*, Routledge, 2015, p. 298.

<sup>21</sup> United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence Against Women*, 1992.

<sup>22</sup> United Nations General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, Volume 1249, p. 13.

In 1997, the World Health Organization (WHO), UNICEF and United Nations Population Fund (UNFPA) issued a Joint Statement on 'Female Genital Mutilation'.<sup>24</sup> In this Joint Statement they described the implications of the practice for public health and human rights. In 2008, a wider group of UN agencies<sup>25</sup> reinforced the classification of FGM/C as a human rights violation in the Interagency Statement on 'Eliminating Female Genital Mutilation'.<sup>26</sup> They stated the following:

"Female genital mutilation violates a series of well-established human rights principles, norms and standards, including the principles of equality and non-discrimination on the basis of sex, the right to life when the procedure results in death, and the right to freedom from torture or cruel, inhuman or degrading treatment or punishment as well as the rights identified below. As it interferes with healthy genital tissue in the absence of medical necessity and can lead to severe consequences for a woman's physical and mental health, female genital mutilation is a violation of a person's right to the highest attainable standard of health. Female genital mutilation has been recognized as discrimination based on sex because it is rooted in gender inequalities and power imbalances between men and women and inhibits women's full and equal enjoyment of their human rights. It is a form of violence against girls and women, with physical and psychological consequences. Female genital mutilation deprives girls and women from making an independent decision about an intervention that has a lasting effect on their bodies and infringes on their autonomy and control over their lives."<sup>27</sup>

This quotation shows that numerous human rights are being violated with the practice of FGM/C. These human rights are enshrined in various human rights treaties that are legally binding upon States that have ratified them. Important human rights instruments at the UN level in relation to the practice of FGM/C are the CEDAW and the Convention on the Rights of the Child (CRC).<sup>28</sup> Since the practice of FGM/C is widespread in large parts of Africa, the human rights instruments of the African Union (AU) need to be taken into account as well. The African Charter on Human and Peoples' Rights (ACHPR), also known as the "Banjul Charter,"<sup>29</sup> the Protocol to the ACHPR on the Rights of Women in

<sup>23</sup> Chapter IV, section 4 will further elaborate on the classification of FGM/C as a human rights violation from the 1950s to the 1990s.

<sup>24</sup> World Health Organization, *Female Genital Mutilation: A Joint WHO/UNICEF/UNFPA Statement*, WHO Library, 1997, p. 3. See Chapter IV, section 4.14 for more information about the Joint Statement on 'Female Genital Mutilation.'

<sup>25</sup> Including World Health Organization (WHO), United Nations Children's Fund (UNICEF), United Nations Population Fund (UNFPA), Office of the United Nations High Commissioner for Human Rights (OHCHR), Joint United Nations Programme on HIV/AIDS (UNAIDS), United Nations Development Programme (UNDP), United Nations Economic Commission for Africa (UNECA), United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations High Commissioner for Refugees (UNHCR), and United Nations Development Fund for Women (UNIFEM).

<sup>26</sup> World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008.

<sup>27</sup> *Ibid.*, p. 9-10.

<sup>28</sup> United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, Volume 1577, p. 3.

<sup>29</sup> Organization of African Unity, *African Charter on Human and Peoples' Rights*, 27 June 1981.

Africa (“Maputo Protocol”),<sup>30</sup> the African Charter on the Rights and Welfare of the Child (ACRWC)<sup>31</sup> and the African Youth Charter (AYC)<sup>32</sup> are important in relation to the practice of FGM/C. These legally binding human rights instruments contain provisions under which FGM/C constitute a violation of human rights, and oblige States parties to take measures to prevent and eliminate the practice.<sup>33</sup>

In addition to these legally binding human rights treaties – or hard law instruments – the practice of FGM/C has been specifically addressed in many other human rights documents, referred to as soft law instruments. Soft law documents are quasi-legal instruments that in principle do not have legally binding effect, such as Declarations,<sup>34</sup> Programmes and Plans of Action,<sup>35</sup> General Recommendations (GR) and General Comments (GC) of Treaty Monitoring Bodies,<sup>36</sup> and non-binding resolutions.<sup>37</sup> Despite the non-binding

<sup>30</sup> African Union, *Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa*, 11 July 2003,

<sup>31</sup> Organization of African Unity, *African Charter on the Rights and Welfare of the Child*, 11 July 1990.

<sup>32</sup> African Union, *African Youth Charter*, 2 July 2006.

<sup>33</sup> See Chapter IV, section 7.2 of this research for the obligations for States in relation to the elimination of FGM/C.

<sup>34</sup> United Nations General Assembly, *Declaration on the Elimination of Violence Against Women*, A/RES/48/104, 20 December 1993.

<sup>35</sup> United Nations General Assembly, *Vienna Declaration and Programme of Action*, A/CONF.157/23, 12 July 1993; United Nations, *Beijing Declaration and Platform of Action*, adopted at the Fourth World Conference on Women, 27 October 1995.

<sup>36</sup> United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 14: Female Circumcision*, A/45/38 and Corrigendum, 1990; United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence Against Women*, 1992; United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, A/54/38/Rev.1, chap. I, 1999; United Nations Committee on the Rights of the Child, *General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, CRC/GC/2003/4, 1 July 2003; United Nations Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child*, CRC/GC/2003/527, November 2003; United Nations Committee on the Rights of the Child, *General Comment No. 7: Implementing Child Rights in Early Childhood*, CRC/C/GC/7/Rev.1, 20 September 2006; United Nations Committee on the Rights of the Child, *General Comment No. 13: The Right of the Child to Freedom from all Forms of Violence*, CRC/C/GC/13, 18 April 2011; United Nations Committee on the Elimination of Discrimination Against Women and the United Nations Committee on the Rights of the Child, *Joint general Recommendation No. 31 of the Committee on the Elimination of Discrimination Against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices*, CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014.

<sup>37</sup> United Nations General Assembly, *Resolution 52/99 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/52/637, 12 December 1997; United Nations General Assembly, *Resolution 53/117 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/53/117, 1 February 1999; United Nations General Assembly, *Resolution 54/133 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/54/133, 7 February 2000; United Nations General Assembly, *Resolution 56/128 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/56/128, 30 January 2002; United Nations General Assembly, *Resolution 58/156 on The Girl Child*, A/RES/58/156, 26 February 2004; United Nations General Assembly, *Resolution 60/141 on The Girl Child*, A/RES/60/141, 11 January 2006; United Nations General Assembly, *Resolution 62/140 on The Girl Child*, A/RES/62/140, 19 February 2008; United Nations General Assembly, *Resolution 66/140 on The Girl Child*, A/RES/66/140, 27 March 2012; United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013; United Nations General Assembly, *Resolution 68/146 on The Girl Child*, A/RES/68/146, 4 February 2014.



nature of these soft law documents, they are considered relevant and influential in the development of international and national human rights law and further action against the practice of FGM/C.<sup>38</sup> Chapter IV will further elaborate on the human rights framework applicable in relation to the practice of FGM/C.

## 1.2 Global goal to end FGM/C in one generation

In the end, the ultimate goal of the human rights framework is to eliminate the practice of FGM/C worldwide. A global commitment to end the practice has been set for the first time in 2002 by the UN GA Special Session on Children: "To achieve these goals, we will implement the following strategies and actions: [...] End harmful traditional or customary practices, such as early and forced marriage and female genital mutilation, which violate the rights of children and women."<sup>39</sup> The primary objective of the UN was to abandon FGM/C by 2010.<sup>40</sup> This objective was later adjusted to 2015, but these objectives proved not to be realistic. In 2008, the UN has set a global goal to eliminate the practice of FGM/C within a generation (i.e. next 20 years).<sup>41</sup>

The international<sup>42</sup> campaign against FGM/C has gained considerable momentum in recent years with three landmark events. In the first place, the launch of the 'UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change' [hereinafter "Joint Programme"]. Initiated in 2008, the Joint Programme became the main UN instrument to promote the acceleration of the elimination of FGM/C.<sup>43</sup> Working in partnership with national governments, civil society, religious leaders, communities and key stakeholders, the Joint Programme aims to support and

<sup>38</sup> A. Boyle and C. Chinkin, *The Making of International Law*, Oxford University Press, 2007, p. 210-229.

<sup>39</sup> United Nations General Assembly, *Resolution S-27/2 on A World Fit For Children*, A/RES/S-27/2, 11 October 2002, p. 15, para. 44.9.

<sup>40</sup> United Nations Population Fund and United Nations Children's Fund, *Female Genital Mutilation/Cutting: Accelerating Change, Funding Proposal UNFPA-UNICEF Joint Programme*, p. 16, available at [http://www.unfpa.org/sites/default/files/pub-pdf/fgm\\_proposal\\_donors.pdf](http://www.unfpa.org/sites/default/files/pub-pdf/fgm_proposal_donors.pdf) [Last Accessed 1 October 2015].

<sup>41</sup> Ibid, p. 21; United Nations Population Fund and United Nations Children's Fund, *Abandonment of Female Genital Mutilation/Cutting: Accelerating Change, Funding Proposal UNFPA-UNICEF Joint Programme Phase II*, January 2014, p. 2, available at <http://www.unfpa.org/sites/default/files/resource-pdf/Funding%20Proposal%20for%20Phase%20II%20of%20the%20UNFPA-UNICEF%20Joint%20Programme.PDF> [Last Accessed 1 October 2015]; United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, p. 5, para. 19.

<sup>42</sup> At the European level, a landmark event was the adoption of the Council of Europe (CoE) Convention on Preventing and Combating Violence Against Women and Domestic Violence ("Istanbul Convention") in May 2011, which entered into force in August 2014. This is the first European legally binding instrument specifically devoted to violence against women and domestic violence. It is also the first European legally binding instrument that included a provision on the practice of FGM/C: Council of Europe, *Convention on Preventing and Combating Violence Against Women and Domestic Violence*, 11 May 2011, Article 38.

<sup>43</sup> United Nations Population Fund and United Nations Children's Fund, *Joint Evaluation Report UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change, 2008-2012*, Volume I, New York, September 2013, p. viii, available at [http://www.unicef.org/evaluation/files/FGM-report\\_11\\_14\\_2013\\_Vol-I.pdf](http://www.unicef.org/evaluation/files/FGM-report_11_14_2013_Vol-I.pdf) [Last Accessed 1 October 2015].

accelerate efforts already being undertaken at the national and regional levels. The Joint Programmes focuses on protecting women and girls from FGM/C using a human rights-based and culturally sensitive approach. In 2014, a second phase of the Joint Programme was launched (January 2014 till December 2017),<sup>44</sup> expanding its work from 15 to 17 countries.<sup>45</sup> The goal of phase II is to contribute to the global elimination of FGM/C in the next generation,<sup>46</sup> more specifically to achieve “a 40% decrease in prevalence among girls aged 14 and younger in at least five countries, with at least one country declaring total elimination of the practice by the end of 2017.”<sup>47</sup>

In the second place, the UN General Assembly (GA) adopted in December 2012 a Resolution on ‘Intensifying Global Efforts for the Elimination of Female Genital Mutilation.’<sup>48</sup> Introduced by African States and adopted by consensus, Secretary-General Ban Ki-moon called the UN Resolution “historic” and “an important step towards a world free from violence against women.”<sup>49</sup> The Resolution emphasized that FGM/C is a human rights violation and called for stronger global efforts to end the practice. It urged States to “take all necessary measures, including enacting and enforcing legislation, to prohibit female genital mutilations and to protect women and girls from this form of violence, and to end impunity.”<sup>50</sup>

In the third place, the CEDAWCee and the Committee on the Rights of the Child (CRCee) adopted a Joint GR/GC on ‘harmful practices’ in November 2014. In this document, both Committees further clarified the obligations of States parties to the CEDAW and CRC by providing “authoritative guidance on legislative, policy and other appropriate measures that must be taken to ensure full compliance with their obligations under the Conventions to eliminate harmful practices.”<sup>51</sup>

<sup>44</sup> United Nations Population Fund and United Nations Children’s Fund, *Abandonment of Female Genital Mutilation/Cutting: Accelerating Change, Funding Proposal UNFPA-UNICEF Joint Programme Phase II*, January 2014, p. 2, available at <http://www.unfpa.org/sites/default/files/resource-pdf/Funding%20Proposal%20for%20Phase%20II%20of%20the%20UNFPA-UNICEF%20Joint%20Programme.PDF> [Last Accessed 1 October 2015].

<sup>45</sup> Including Burkina Faso, Djibouti, Uganda, Egypt, Ethiopia, Eritrea, Gambia, Guinea, Guinea Bissau, Kenya, Mali, Mauritania, Nigeria, Senegal, Sudan, Somalia and Yemen.

<sup>46</sup> United Nations Population Fund and United Nations Children’s Fund, *Abandonment of Female Genital Mutilation/Cutting: Accelerating Change, Funding Proposal UNFPA-UNICEF Joint Programme Phase II*, January 2014, p. 2, available at <http://www.unfpa.org/sites/default/files/resource-pdf/Funding%20Proposal%20for%20Phase%20II%20of%20the%20UNFPA-UNICEF%20Joint%20Programme.PDF> [Last Accessed 1 October 2015].

<sup>47</sup> United Nations Population Fund, *Joint Programme on Female Genital Mutilation/Cutting*, available at <http://www.unfpa.org/joint-programme-female-genital-mutilationcutting> [Last Accessed 1 October 2015].

<sup>48</sup> United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013.

<sup>49</sup> United Nations News Centre, *Ban Welcomes UN General Assembly Resolutions Eliminating Female Genital Mutilation*, 21 December 2012, available at <http://www.un.org/apps/news/story.asp?NewsID=43839#.VfKM2TtHw> [Last Accessed 1 October 2015].

<sup>50</sup> United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, para. 4.

<sup>51</sup> United Nations Committee on the Elimination of Discrimination Against Women and the United Nations Committee on the Rights of the Child, *Joint general Recommendation No. 31 of the Committee on the Elimination of Discrimination Against Women/General Comment No. 18 of the Committee on the*

### 1.3 Practice of FGM/C remains widespread

Some progress has been made in the past decade at both the international, regional and national level. According to the Interagency Statement on 'Eliminating Female Genital Mutilation,' the following has been achieved:

"Much effort has been made to counteract female genital mutilation, through research to generate further evidence on which to base interventions, through working with communities, through advocacy and by passing laws. Progress has been made at both international and local levels. More United Nations agencies are involved; human rights treaty monitoring bodies and international resolutions have condemned the practice; legal frameworks have improved in many countries; and political support for ending female genital mutilation is growing. Most significantly, in some countries the prevalence of female genital mutilation has declined, and an increasing number of women and men in practising communities are declaring their support for its abandonment."<sup>52</sup>

In spite of these positive signs, the overall progress has been slow. The prevalence of FGM/C has declined in a number of countries, including in the Central African Republic, Kenya, Sierra Leone and Egypt.<sup>53</sup> However, in other countries (including in Sudan, Gambia, Chad and Tanzania) the FGM/C prevalence remained constant and in some countries (including in Guinea-Bissau and Burkina Faso) an increase in prevalence rate can be observed.<sup>54</sup> The decline in the worldwide FGM/C prevalence is not as substantial as was hoped for. In December 2013, the UN GA acknowledged in Resolution 68/146 on the Girl Child that the goal of ending FGM/C in the next generation "remains unfinished business."<sup>55</sup> In its most recent Resolution, the UN GA stated that they remained deeply concerned that, despite the increase in national, regional and international efforts and the focus on the elimination of FGM/C, "the practice continues to exist in all regions of the world."<sup>56</sup>

Bettina Shell-Duncan, a professor in anthropology at the University of Washington who has been studying the practice of FGM/C in many countries for years, said in March 2015: "There have been a multitude of different strategies, but one of the frustrating things for those working on this issue is that there has been surprisingly little success in large-scale abandonment of the practice. [...] In most countries, there's no decline in the prevalence of cutting, or only the slightest beginning of change among the youngest group of

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*Rights of the Child on Harmful Practices*, CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014, para. 2.

<sup>52</sup> World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008, p. 3.

<sup>53</sup> United Nations Children's Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 95.

<sup>54</sup> Chapter III, section 6.1 of this research will provide more information on the statistics of UNICEF in relation to the prevalence of FGM/C.

<sup>55</sup> United Nations General Assembly, *Resolution 68/146 on The Girl Child*, A/RES/68/146, 4 February 2014, p. 5.

<sup>56</sup> United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013.

women.”<sup>57</sup> The 2012 Report ‘Violating Children’s Rights: Harmful Practices based on Tradition, Culture, Religion or Superstition’ of the Council on Violence against Children also observed a “devastating failure of international and regional human rights mechanisms to provoke the necessary challenge, prohibition and elimination.”<sup>58</sup>

## 2 THE COMPLIANCE QUESTION

### 2.1 Gap between State’s commitments and behaviour

International law is built on the foundation of State consent.<sup>59</sup> As Henkin argued: “No treaty, old or new, whatever its character or subject, is binding on a State unless it has consented to it.”<sup>60</sup> A State establishes its consent to be bound by a treaty by means of “ratification”, “acceptance”, “approval” and “accession.”<sup>61</sup> With this act, States demonstrate their willingness to undertake the legal obligations under international law. The Vienna Convention on the Law of Treaties<sup>62</sup> codified the principle of *pacta sunt servanda* and established that treaties must be respected: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>63</sup>

A growing number of States where FGM/C is prevalent have signed and ratified international and regional human rights treaties. As a consequence, the human rights framework that is designed to eliminate FGM/C is applicable in these countries. States have an obligation under international law to comply with the human rights treaties they have ratified. The previous section showed that there is no significant overall decline in the worldwide prevalence of FGM/C. This raises the question to what extent (and why) States comply, or in the case of FGM/C, appear not to comply with the human rights framework. There seems to be a gap between State’s commitments to comply with the obligations and recommendations set forth in legally binding treaties and non-binding soft law documents on the one hand and the behaviour of States on the other. Does that mean that the commitments of States in relation to the human rights framework are “empty promises”? The answer to this question is likely to be negative. Most probably, State’s commitments are more than just empty promises.

<sup>57</sup> D. Bach, *UW Expert Part of International Research Project on Female Genital Cutting*, University of Washington, 13 March 2015, available at <http://www.washington.edu/news/2015/03/13/uw-expert-part-of-international-research-project-on-female-genital-cutting/> [Last Accessed 1 October 2015].

<sup>58</sup> International NGO Council on Violence against Children, *Violating Children’s Rights: Harmful Practices Based on Tradition, Culture, Religion or Superstition*, October 2012, p. v, available at [https://srsq.violenceagainchildren.org/sites/default/files/documents/docs/InCo\\_Report\\_15Oct.pdf](https://srsq.violenceagainchildren.org/sites/default/files/documents/docs/InCo_Report_15Oct.pdf) [Last Accessed 1 October 2015].

<sup>59</sup> A.T. Guzman, *Against Consent*, *Virginia Journal of International Law*, Volume 52, 2011, p. 747.

<sup>60</sup> L. Henkin, *International Law: Politics and Values*, Martinus Nijhoff Publishers, 1995, p. 28.

<sup>61</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, Volume 1155, p. 331, Article 2(b).

<sup>62</sup> Senegal acceded to the Vienna Convention on the Law of Treaties in 1986.

<sup>63</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, Volume 1155, p. 331, Article 26.

The question when and why States comply with international law has become of central interest among scholars from different disciplines. Guzman<sup>64</sup> and Bradford<sup>65</sup> explain that the question of compliance is one of the most central questions within the international legal academy: “the absence of an explanation for why States obey international law in some instances but not others threatens to undermine the very foundations of the discipline.”<sup>66</sup> Other scholars argue that without an understanding of the connection between international law and the behaviour of States, an explanation for the function of the international legal system is missing.<sup>67</sup> The ‘compliance question’ challenges the efficacy of international law and questions the authenticity of State’s legal commitments to protect and promote human rights.<sup>68</sup> Hafner-Burton and Tsutsui stated the following: “What good are international human rights treaties if they do not improve the human rights situation on the ground?”<sup>69</sup> In the end, the goal of the human rights framework is to translate human rights into a lasting reality.

## 2.2 Theories explaining compliance with international law

The literature on compliance with international law represents an example of multidisciplinary and interdisciplinary research undertaken at the boundaries of International Relations (IR) and International Law (IL).<sup>70</sup> In general, IL and IR scholars sought to answer the question of compliance with the aim to gain a deeper understanding of the role of international law in shaping State behaviour. IL scholars started to study the compliance question from the 1960s onwards, but IR scholars were not interested in international law at that time and neglected for instance the adoption of the UDHR.<sup>71</sup> They became interested in the importance of international law in general and the human rights framework in particular in the 1970s, because of changes in world politics and international law (i.e. the rise of the UN and other international and regional organizations) and the fact that human rights were prominently present in international politics.<sup>72</sup> They were puzzled by the growth of international law and the human rights movement. The legal landscape changed significantly during these years: the expansion of international institutions and regimes, the

<sup>64</sup> A.T. Guzman, A Compliance-Based Theory of International Law, *California Law Review*, Volume 90, 2002, p. 1826.

<sup>65</sup> W.C. Bradford, *In the Minds of Men: A Theory of Compliance with the Laws of War*, SSRN, 6 June 2004, p. 6, available at <http://ssrn.com/abstract=555894> or doi:10.2139/ssrn.555894 [Last Accessed 1 October 2015].

<sup>66</sup> A.T. Guzman, A Compliance-Based Theory of International Law, *California Law Review*, Volume 90, 2002, p. 1826.

<sup>67</sup> M. Burgstaller, Amenities and Pitfalls of a Reputational Theory of Compliance with International Law, *Nordic Journal of International Law*, Volume 76, 2007, p. 42.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> H.M. Hensel, *Sovereignty and the Global Community: the Quest for Order in the International System*, Ashgate Publishing, 2004, p. 111.

<sup>71</sup> L. Hoder, *Is there a Theory of International Legal Compliance?*, Paper for the ECPR Graduate Conference 2010, Panel International Norms: Recent Developments in a Growing Debate, Dublin, Ireland, 31 august 2010, p. 2.

<sup>72</sup> H.H. Koh, Transnational Legal Process, *Nebraska Law Review*, Volume 75, 1996, p. 191.

increase of non-State actors and the influence of international law in national legal systems.<sup>73</sup> As a result of IR scholars' rising curiosity in international law, they became sensitive to the issue of compliance and developed theories explaining compliance with international law.<sup>74</sup> The issue of compliance became an area of research for IR scholars and IL scholars alike.

Although IR and IL covered the same 'territory', the two disciplines evolved independently of one another and at first reached different conclusions about the functions and influence of international law. Abbot wrote the following about the estrangement between IL and IR: "With a few notable exceptions, scholars in these two fields have long proceeded on separate tracks. They have for the most part worked independently, published in different journals, attended different conferences, and cited each other's work only to a very limited degree. Over time, scholars in each field have become unfamiliar with the other's research agenda, making cooperation increasingly difficult."<sup>75</sup> The advantages made by each discipline in examining and theorizing compliance were ignored by the other discipline.<sup>76</sup> Koh argued: "By the early 1980s, the schism between the two disciplines was nearly complete. International lawyers tended to find the glass half full [...] while international relations theorists found the glass half empty."<sup>77</sup> The existing disagreements about the theories of compliance between IR scholars and IL scholars are still ingredients for a lively academic debate. The two disciplines provide different (though not uncomplimentary) answers to the question of compliance.<sup>78</sup> As Simmons argued: "The literature on international rule compliance is quite disparate in methods, theoretical orientation, and findings."<sup>79</sup> However, as Chapter II will show, research agendas in IL and IR have converged around the 'compliance question' in the past decade. The chasm between the two disciplines has narrowed as IL and IR theorists have begun to share insights, sometimes resulting in articles in co-authorship. In addition, new interdisciplinary theories have been developed providing an answer to the 'compliance question'.

<sup>73</sup> In states with a dualist system, international law is not directly applicable at the national level. It is required to translate international law into national legislation before the national courts can apply it. However, in states with a monist system, international law does not need to be translated into national law. The act of ratifying a treaty immediately incorporates the treaty into national law.

<sup>74</sup> Sonia Cardenas argued that human rights research has entered the mainstream of political science. She studied the number of articles in the political science top-ranked publications to answer the question how much human rights influenced political science scholarship. Before 1980, only 34 articles were published on human rights, 36 articles in the 1980s, 60 articles in the 1990s and 459 between 2000 and August 2008. Yet, she concluded that despite this dramatic growth in human rights scholarship, human rights research remains relatively marginal among major political science publications. See S. Cardenas, *Mainstreaming Human Rights: Publishing Trends in Political Science, Political Science & Politics*, Volume 42, 2009.

<sup>75</sup> K.W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, *Yale Journal of International Law*, Volume 14, 1989, p. 337.

<sup>76</sup> O.A. Hathaway, *Do Human Rights Treaties Make a Difference?* *Yale Law Journal*, Volume 112, 2002, p. 1942-1943.

<sup>77</sup> H.H. Koh, *Transnational Legal Process*, *Nebraska Law Review*, Volume 75, 1996, p. 191-192.

<sup>78</sup> R.B. Mitchell, *Compliance Theory: An Overview*, in: J. Cameron et al., *Improving Compliance with International Environmental Law*, Earthscan, 1996, p. 3-4.

<sup>79</sup> B.A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, *American Political Science Review*, Volume 94, No. 4, 2000, p. 819-835.

### 3 A SHORT HISTORY OF INTERNATIONAL HUMAN RIGHTS LAW

Since the ‘compliance question’ touches upon the “foundations” of international (human rights) law in general in shaping the behaviour of States, a short history of the development of international human rights law will be provided below.

#### 3.1 The adoption of the United Nations Charter and the Universal Declaration of Human Rights

After the devastation of World War II, the protection of human rights became one of the most pressing goals of the international community.<sup>80</sup> In 1945, governments committed themselves to establishing the UN. Besides maintaining international peace and security, one of the central reasons for founding the UN is to promote and encourage universal respect for human rights and fundamental freedoms.<sup>81</sup> In the preamble of the Charter of the UN, the drafters reaffirmed their “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”<sup>82</sup> To advance this goal, the UN established in 1946 the United Nations Commission on Human Rights (UNCHR). The UNCHR<sup>83</sup> was charged with the task of drafting a document spelling out the meaning of these human rights and fundamental freedoms proclaimed in the UN Charter, which would later become known as the Universal Declaration of Human Rights (UDHR).<sup>84</sup>

In 1948, with the adoption of the UDHR, for the first time in history an international document had come into being which defined the rights of every human being in detail. The preamble of the UDHR starts out with the words: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” The very name of the document and the preamble emphasizes that the UDHR was to set standards of rights for all people everywhere.<sup>85</sup> The belief was that everyone, anywhere in the world, simply by virtue of his or her humanity (rather than having the rights contingently, on the basis of specific qualifications, such as citizenship or national laws), is entitled to human rights.<sup>86</sup> The adoption of the UDHR constituted a landmark achievement in human rights law, because it was the first international human rights document. The UDHR has been described as “the constitution of the

<sup>80</sup> E.M. Hafner-Burton and K. Tsutsui, Human Rights in a Globalizing World: The Paradox of Empty Promises, *American Journal of Sociology*, Volume 110, No. 5, 2005, p. 1373.

<sup>81</sup> United Nations, *Charter of the United Nations*, 24 October 1945, Article 1 and Article 55(c).

<sup>82</sup> *Ibid*, preamble.

<sup>83</sup> The drafting committee of the UDHR consisted of: Eleanor Roosevelt (Chairperson – US), Peng-chun Chang (Vice-chair - China), Charles Malik (Rapporteur - Lebanon), William Hodgson (Australia), Hernán Santa Cruz (Chile), René Cassin (France), Alexander E. Bogomolov (USSR), Charles Dukes (United Kingdom) and John P. Humphrey (Canada).

<sup>84</sup> United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948.

<sup>85</sup> M. Dziva et al., Examining the Significance and Controversy of Human Rights Education in Developing Countries, *Journal of Human Ecology*, Volume 45, No. 3, 2014, p. 198.

<sup>86</sup> A. Sen, Elements of a Theory of Human Rights, *Philosophy & Public Affairs*, Volume 32, No. 4, 2004, p. 315-316.

entire human rights movement” and the “single most cited human rights instrument.”<sup>87</sup> Nearly all human rights instruments and documents were inspired by, and include abundant references to, the UDHR.<sup>88</sup> According to the UN, the UDHR “is generally agreed to be the foundation of international human rights law.”<sup>89</sup>

### 3.2 International Bill of Human Rights

The adoption of the UN Charter and the UDHR were the first steps at the international level to creating a human rights framework.<sup>90</sup> According to Hafner-Burton and Tsutsui, the adoption of the UN Charter and the UDHR “provided a window of opportunity for States, international organizations, and civil society actors and organizations to place human rights on the international legal agenda.” The UDHR was not a treaty in the formal sense, because it was not ratified by States, but enacted as a resolution by the GA. Since the UN Charter does not give power to the GA to make international law, the UDHR originally lacked any binding force under international law.<sup>91</sup> However, as soon as the UDHR was enacted, attempts were made to further develop and translate the standards in the UDHR into an internationally legally binding human rights convention. Although the UDHR emphasizes universal respect and adherence to all human rights (and does not distinguish between on the one hand civil and political rights and on the other hand economic, social and cultural rights),<sup>92</sup> there was an intense debate in the early 1950s on the question whether the unity of the UDHR should be maintained or whether the UDHR should be split up into two separate treaties. This debate was rooted in an ideological conflict between the supporters of political rights and liberal democracy (e.g. the United States and its allies) versus the supporters of economic rights and socialism (e.g. the Soviet bloc). The socialist States insisted on the interdependence and indivisibility of all human rights and they advocated for one human rights covenant. However, in the end, Western States succeeded in preventing the creation of one human rights covenant. They demanded a division of the

<sup>87</sup> H.J. Steiner et al., *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, Oxford University Press, 2008, p. 136.

<sup>88</sup> D. Shelton, *The Oxford Handbook of International Human Rights Law*, Oxford University Press, 2013, p. 1.

<sup>89</sup> United Nations, *The Universal Declaration of Human Rights*, available at [http://www.un.org/en/documents/udhr/hr\\_law.shtml](http://www.un.org/en/documents/udhr/hr_law.shtml) [Last Accessed 1 October 2015].

<sup>90</sup> Before World War II, States limited their international obligations to declarations of intent and to a small number of treaties and conventions, for example the formal prohibition of the slave trade by the Treaty of Vienna (1815) and the General Act of Brussels. See also: E.M. Hafner-Burton and K. Tsutsui, Human Rights in a Globalizing World: The Paradox of Empty Promises, *American Journal of Sociology*, Volume 110, No. 5, 2005, p. 1374.

<sup>91</sup> The GA is the main deliberative, policymaking and representative organ of the UN. All 193 UN Member States are represented in the GA, making it the only UN body with universal representation. For more information, see United Nations, *Main Organs*, available at <http://www.un.org/en/sections/about-un/main-organs/index.html> [Last Accessed 1 October 2015].

<sup>92</sup> United Nations General Assembly, *Resolution 421(V) on Draft International Covenant on Human Rights and Measures of Implementation: Future Work of the Commission on Human Rights*, A/1775, 4 December 1950.



UDHR into two different tracks: one treaty for the protection of civil and political rights and one treaty for the protection of economic, social and cultural rights.<sup>93</sup> The International Covenant on Civil and Political Rights (ICCPR)<sup>94</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>95</sup> were adopted in 1966 and entered into force ten years later in 1976. Together with the UDHR, they form the International Bill of Human Rights, which now stands at the centre of the human rights regime.<sup>96</sup>

### 3.3 Growing body of human rights law

During the years following the signing of the ICCPR and the ICESCR, the body of human rights law grew rapidly. While before the adoption of the UDHR there were virtually no international human rights instruments, the post-World War II era has seen a proliferation of human rights declarations, conventions, protocols, treaties, charters and agreements. As Hathaway explains: “Over the last half-century, the number of treaties that address issues of human rights has grown from a handful to hundreds.”<sup>97</sup> This rapid growth resulted in a worldwide structure of international law designed for the protection and promotion of human rights.<sup>98</sup> International human rights law became, in a relatively short period of time, an important branch of international law. Between 1965 and 2006, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),<sup>99</sup> CEDAW, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),<sup>100</sup> CRC, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW),<sup>101</sup> the Convention on the Rights of Persons with Disabilities (CRPD)<sup>102</sup> and the Convention for the Protection of All Persons from Enforced Disappearance (ICED)<sup>103</sup> were adopted. These seven human rights treaties, together with the ICCPR and the ICESCR are now generally regarded as the nine “core” UN

<sup>93</sup> United Nations General Assembly, *Resolution 543(VI) on the Preparation of two Draft International Covenants on Human Rights*, A/2119, 5 February 1952.

<sup>94</sup> United Nations General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, Volume 999, p. 171.

<sup>95</sup> United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, Volume 993, p. 3.

<sup>96</sup> H.J. Steiner et al., *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, Oxford University Press, 2008, p. 133.

<sup>97</sup> O.A. Hathaway, *The Cost of Commitment*, John M. Olin Center for Studies in Law, Economics, and Public Policy Working Papers, Yale Law School, Paper 273, 2003, p. 1.

<sup>98</sup> D. Shelton, *The Oxford Handbook of International Human Rights Law*, Oxford University Press, 2013, p. 1.

<sup>99</sup> United Nations General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, Volume 660, p. 195.

<sup>100</sup> United Nations General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

<sup>101</sup> United Nations General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, A/RES/45/158, 18 December 1990.

<sup>102</sup> United Nations General Assembly, *Convention on the Rights of Persons with Disabilities: Resolution adopted by the General Assembly*, A/RES/61/106, 24 January 2007.

<sup>103</sup> United Nations General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006.

human rights treaties.<sup>104</sup> These “core” human rights treaties (listed below in table 1.1) are legally binding upon States that have ratified the treaty.

Table 1.1 The nine “core” UN human rights treaties

Treaty	Adoption by GA	Entry into force	Number of ratifying States <sup>105</sup>
ICERD	1965	1969	177
ICCPR	1966	1976	168
ICESCR	1966	1976	164
CEDAW	1979	1981	189
CAT	1984	1987	158
CRC	1989	1990	196
ICRMW	1990	2003	48
CRPD	2006	2008	159
ICED	2006	2010	50

In addition to these human rights treaties, various optional protocols<sup>106</sup> have been adopted, further extending the obligations and rights guaranteed in the “core” human rights treaties. Each of the “core” human rights treaties has established a committee of independent experts, or a so-called Treaty Monitoring Body tasked with the competence to monitor the implementation of and compliance with the treaty provisions by its State Parties. An important part of their work consists of fact-finding, i.e. trying to get all relevant

<sup>104</sup> The United Nations Office of the High Commissioner for Human Rights refers to ten “core” human rights instruments and includes the Optional Protocol to the CAT as the tenth “core” human rights treaty. See Office of the High Commissioner for Human Rights, *The Core International Human Rights Instruments and Their Monitoring Bodies*, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> [Last Accessed 1 October 2015].

<sup>105</sup> As of 1 October 2015, see United Nations, *Treaty Collection, Chapter IV: Human Rights*, available at <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> [Last Accessed 1 October 2015].

<sup>106</sup> Including the Optional Protocol to the Covenant on Economic, Social and Cultural Rights (OP-ICESCR), the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP 1), the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (ICCPR-OP 2), the Optional Protocol to the Convention on the Elimination of Discrimination Against Women (OP-CEDAW), the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT), the Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OP-CRC-AC), the Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OP-CRC-SC), the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (OP-CRC-IC) and the Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD).

information on a State's compliance behaviour.<sup>107</sup> Some Optional Protocols created additional institutional mechanisms for ensuring compliance, for example by providing individuals the means to submit complaints about the violation of their human rights against their governments.

One of the goals of the UN was the universal ratification of the "core" human rights treaties. Therefore, the UN has put an effort to push States to sign and ratify these treaties.<sup>108</sup> Nowadays, the vast majority of States have ratified nearly all "core" human rights treaties over a relatively short period of time. More precisely, as table 1.1 shows, seven of the "core" UN human rights treaties have been ratified by more than 150 States. These States thus consented to be bound by the norms and legal obligations to protect the fundamental rights of every human being through law. Some scholars therefore argue that the human rights framework became an "accepted fact of international life."<sup>109</sup> For many scholars and activists alike, this rapid growth of the international human rights framework and the high formal acceptance of these human rights instruments suggested "substantial progress towards universal recognition of human rights norms."<sup>110</sup> However, despite the growing body of human rights law and the increasing global legal commitments of States to protect human rights, the question remains what difference these human rights norms make in actual State practice.<sup>111</sup>

#### 4 TRANSLATING HUMAN RIGHTS INTO PRACTICE

##### 4.1 Do human rights treaties improve respect for human rights on the ground?

For a long time, international law scholars firmly believed that human rights treaties improved respect for human rights in practice. There was a widespread confidence that international law in general, and the human rights framework in particular, mattered and had the power to shape States' behaviour and to improve human rights practices. Goodman and Jinks argued: "The normative appeal of international law is predicated upon the view that well-designed rules will — in general and on average — promote peace, stability and good governance."<sup>112</sup> International law was seen as a means to achieve human rights objectives. After all, a lot of diplomatic effort was put in negotiating human rights treaties and in encouraging States to ratify them.<sup>113</sup> But is the

<sup>107</sup> W.J.M. Van Genugten et al., *Loopholes, Risks and Ambivalences in International Lawmaking: The Case of a Framework Convention on Victims' Rights*, *Netherlands Yearbook of International Law*, Volume 37, 2007, p. 137.

<sup>108</sup> O.A. Hathaway, *The Cost of Commitment*, John M. Olin Center for Studies in Law, Economics, and Public Policy Working Papers, Yale Law School, Paper 273, 2003, p. 1; H.J. Steiner et al., *International Human Rights in Context: Law, Politics, Morals*, Oxford University Press, 2007, p. 14-36.

<sup>109</sup> R.K.M. Smith, *Textbook on International Human Rights*, Oxford University Press, 2011, p. 162.

<sup>110</sup> L.C. Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behaviour?*, *Journal of Peace Research*, Volume 36, 1999, p. 95.

<sup>111</sup> S. Baumbartner, *Does Access to Justice Improve Countries' Compliance With Human Rights Norms? – An Empirical Study*, *Cornell International Law Journal*, Volume 44, 2011, p. 442.

<sup>112</sup> R. Goodman and D. Jinks, *Measuring the Effects of Human Rights Treaties*, *European Journal of International Law*, Volume 14, No. 1, 2003, p. 171.

<sup>113</sup> E.A. Posner, *The Twilight of Human Rights Law*, Oxford University Press, 2014, p. 69.

international human rights framework able to mitigate or eliminate the problems it is designed to address?

#### 4.2 No State has a perfect human rights record

Unfortunately, the current state of affairs suggests that non-compliance with international law is very common, particularly in the area of human rights. Pillay (former UN High Commissioner for Human Rights) said during an interview: “I would say that not a single State can claim to have a perfect human rights record. There are issues of concern in every country in the world.”<sup>114</sup> Also the U.S. State Department Country Reports on Human Rights reveal that there is not one country in the world with a perfect or near-perfect human rights record.<sup>115</sup> While the majority of States have ratified nearly all the “core” human rights treaties, human rights violations remain widespread. The aspirations of the UDHR of a world in which human rights are being respected everywhere have not been achieved.

Today, news reaches us faster than ever before and much of it concerns human rights violations. Merry argued: “there are fissures between the global settings where human rights ideas are codified into documents and the local communities where the subjects of these rights live and work.”<sup>116</sup> Posner is very sceptical and argues that human rights law has failed to accomplish its objectives.<sup>117</sup> He claims that there is little evidence that human rights treaties have improved the wellbeing of people. In his book, *The Twilight of Human Rights Law*,<sup>118</sup> he concludes that international human rights law has little real impact.<sup>119</sup> To substantiate his claim, he wrote the following:

“In much of the Islamic world, women lack equality, religious dissenters are persecuted and political freedoms are curtailed. The Chinese model of development, which combines political repression and economic liberalism, has attracted numerous admirers in the developing world. Political authoritarianism has gained ground in Russia, Turkey, Hungary and Venezuela. Backlashes against LGBT rights have taken place in countries as diverse as Russia and Nigeria. The traditional champions of human rights – Europe and the United States – have floundered. Europe has turned inward as it has struggled with a sovereign debt crisis, xenophobia towards its Muslim communities and disillusionment with Brussels. The United States, which used torture in the years after 9/11 and continues to kill civilians with drone strikes, has lost much of its moral authority. Even age-old scourges such as slavery continue to exist. A recent report estimates that nearly 30

<sup>114</sup> United Nations News Center, *High Commissioner for Human Rights Navi Pillay*, 28 August 2014, available at <http://www.un.org/apps/news/newsmakers.asp?NewsID=110> [Last Accessed 1 October 2015].

<sup>115</sup> S.P. Baumgartner, Does Access To Justice Improve Countries’ Compliance with Human Rights Norms? – An Empirical Study, *Cornell International Law Journal*, Volume 44, 2011, p. 446.

<sup>116</sup> S.E. Merry, *Human Rights & Gender Violence, Translating International Law into Local Justice*, University of Chicago Press, 2006, p. 2-3.

<sup>117</sup> E.A. Posner, *The Twilight of Human Rights Law*, Oxford University Press, 2014, p. 7.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*, p. x.

million people are forced against their will to work. It wasn't supposed to be like this."<sup>120</sup>

Similarly, Koskenniemi's critical and often cited *From Apology to Utopia*<sup>121</sup> portrays the international legal doctrine as contradictory and repetitive argumentative routine that is incapable of producing meaningful "legal" results.<sup>122</sup>

### 4.3 Empirical evidence on human rights treaty compliance

IL and IR theories alone do not tell us all about the ability of international law to generate real change at the national level. Shaffer and Ginsburg claimed: "the theoretical debate over whether international law matters is a stale one. What matters now is the study of the conditions under which international law is formed and has effects. International law is the product of specific forces and factors; it accomplishes its ends under particular conditions."<sup>123</sup> The question of compliance with international human rights law is not only fundamental from a theoretical, but also from an empirical perspective.<sup>124</sup> Goodman and Jinks argued that, in the end, the question whether human rights treaties improve human rights conditions on the ground is empirical in character. They were among the first scholars that noted the importance of empirical work in human rights scholarship.<sup>125</sup>

Empirical work on international law and compliance was rare until two decades ago. Before the 1990s, scholars did not empirically assess the compliance question. The following quotations from scholars illustrate this. Simmons argued for example: "Despite the recent interest in issues surrounding compliance, and more generally the effects of rules on international politics, the effort to link theory with evidence is still in its infancy."<sup>126</sup> Mitchell used similar wordings and argued: "empirical understanding of the impact of international law on behaviour, at least by political scientists, remains in its infancy."<sup>127</sup> Hafner-Burton refers to this as "persistent gaps between rhetorical success and empirical reality."<sup>128</sup> Hoder argued: "the lack of empirical testing of these

<sup>120</sup> E.A. Posner, *The Case Against Human Rights*, The Guardian, 4 December 2014, available at <http://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights> [Last Accessed 1 October 2015].

<sup>121</sup> M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge University Press, 2005.

<sup>122</sup> J. von Bernstorff, Sisyphus was an international lawyer. On Martti Koskenniemi's "From Apology to Utopia" and the Place of Law in International Politics, *German Law Journal*, Volume 7, No. 12, 2006, p. 1015.

<sup>123</sup> G. Shaffer and T. Ginsburg, The Empirical Turn in International Legal Scholarship, *The American Journal of International Law*, Volume 106, No. 1, January 2012, p. 1.

<sup>124</sup> H.H. Koh, Why Do Nations Obey International Law?, *Yale Law Journal*, Volume 106, 1996, p. 2600.

<sup>125</sup> R. Goodman and D. Jinks, Measuring the Effects of Human Rights Treaties, *European Journal of International Law*, Volume 14, No. 1, 2003, p. 171.

<sup>126</sup> B.A. Simmons, Compliance With International Agreements, *Annual Review of Political Science*, Volume 1, No.1, 1998, p. 77.

<sup>127</sup> R.B. Mitchell, *Compliance Theory: An Overview*, in: *Improving Compliance with International Environmental Law*, James Cameron, Jacob Werksman, and Peter Roderick, Earthscan, 1996, p. 3.

<sup>128</sup> E.M. Hafner-Burton and J. Ron, Seeing Double: Human Rights Impact through Qualitative and Quantitative Eyes, *World Politics*, Volume 61, No. 2, 2009, p. 262

theories makes this theoretically sophisticated interdisciplinary work very vague. There is a lack of systematic, multi-case comparative studies, which restrict the nature of claims and prescriptions that compliance theorists can present.”<sup>129</sup> Baumgartner argued: “Not until recently, however, have scholars undertaken the task of considering in depth the way in which international human rights law affects actual State practice. The result has been a number of theories to explain the behaviour of States in the face of human rights obligations and international norms more generally. However, few of these theories have been tested empirically.”<sup>130</sup>

This has changed in the past fifteen years.<sup>131</sup> A new generation of empirical research emerged on how international human rights law works in different contexts. Kingsbury noted: “The much-needed empirical work on compliance is beginning to appear in increasing quantity, involving case studies, large-*n* series, and other methodologies.”<sup>132</sup> Pioneering scholars with different backgrounds (mostly political scientists and law professors) took an effort to move beyond the descriptive theoretical work in the field of compliance. They attempted to rigorously test the premise that international human rights law improves respect for human rights.<sup>133</sup> Most of this empirical work seeks to directly address the question if international human rights law matters. They have used different empirical methods and statistical techniques to evaluate in the first place why States sign and ratify international human rights treaties and in the second place how those treaties influence State behaviour. Since international law’s normativity is aimed at changing the behaviour of States, scholars have tried to examine the effectiveness of international human rights law by studying whether a State’s human rights performance improved after treaty ratification. In other words: whether treaty ratification reduces human rights violations. Most (but not all) of the empirical studies on compliance with international human rights treaties are quantitative and “help refine theoretical

<sup>129</sup> L. Hoder, *Is there a theory of international legal compliance?*, paper for the ECPR Graduate Conference 2010, Panel International Norms: Recent Developments in a Growing Debate, Dublin, Ireland, 31 august 2010, p. 5.

<sup>130</sup> S.P. Baumgartner, *Does Access to Justice Improve Countries’ Compliance with Human Rights Norms? An Empirical Study*, *Cornell International Law Journal*, Volume 44, 2011, p. 442.

<sup>131</sup> S.C. Poe and C.N. Tate, *Repression of Human Rights to Personal Integrity in the 1980s: A Global Analysis*, *American Political Science Review*, Volume 88, No. 4, 1994, p. 853-872; S.C. Poe et al., *Repression of the Human Right to Personal Integrity Revisited: A Global Cross-National Study Covering the Years 1976-1993*, *International Studies Quarterly*, Volume 43, No. 2, 1999, p. 291-313; J.M. McCormick and N.J. Mitchell, *Human Rights Violations, Umbrella Concepts, and Empirical Analysis*, *World Politics*, Volume 49, No. 4, 1997, p. 510-525; D.L. Cingranelli and D.L. Richards, *Respect for Human Rights after the End of the Cold War*, *Journal of Peace Research*, Volume 36, No. 5, 1999, p. 511-534; S.C. Zanger, *A Global Analysis of the Effect of Political Regime Changes on Life Integrity Violations 1977-93*, *Journal of Peace Research*, Volume 37, No. 2, 2000, p. 213-233; C. Davenport, *Human Rights and the Democratic Proposition*, *Journal of Conflict Resolution*, Volume 43, No. 1, 1999, p. 92-116.

<sup>132</sup> B. Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, *Michigan Journal of International Law*, Volume 19, 1998, p. 347.

<sup>133</sup> E.A. Posner, *Martii Koskeniemi on Human Rights: An Empirical Perspective*, SSRN, March 2014, available at <http://www.law.uchicago.edu/files/file/467-eap-martii.pdf> [Last Accessed 1 October 2015].

hypothesis and determine the conditions under which particular claims are valid or invalid.”<sup>134</sup>

The findings of these empirical studies on compliance (and non-compliance) with international human rights law are surprising, striking and at times controversial. Although a few scholars are optimistic and have (limited) empirical evidence that – in certain circumstances – human rights treaties improve respect for human rights,<sup>135</sup> a growing body of empirical work suggests that international human rights law has limited effect on the behaviour of States. Contrary to what is expected, treaty ratification is according to these studies not associated with better domestic human rights practices. Contrary to what was expected, some of these studies<sup>136</sup> show that treaty ratification might have negative effects on human rights practices and might in some instances even increase human rights violations. Hathaway, for instance, claims that ratification of human rights treaties is associated with worse, rather than better, human rights practices. She claims that States “use ratification as a symbolic

<sup>134</sup> K. Raustriala and A. Slaughter, *International Law, International Relations and Compliance*, in: W. Carlsnaes et al., *Handbook of International Relations*, London, Sage Publications, 2012, p. 548.

<sup>135</sup> B.A. Simmons, Compliance With International Agreements, *Annual Review of Political Science*, Volume 1, No.1, 1998, p. 75-93; B.A. Simmons, Money and the Law: Why Comply with the Public International Law of Money?, *Yale Journal of International Law*, Volume 25, 2000, p.323-362; B.A. Simmons, International Law and State Behavior: Commitment and Compliance in International Monetary Affairs, *American Political Science Review*, Volume 94, No. 4, 2000, p. 819-836; B.A. Simmons, Mobilizing for Human Rights: International Law in Domestic Politics, Cambridge University Press, 2009; B.A. Simmons, Civil Rights in International Law: Compliance with Aspects of the “International Bill of Rights”, *Indiana Journal of Global Legal Studies*, Volume 16, No. 2, 2009, p. 437-481; B.A. Simmons, Treaty Compliance and Violation, *Annual Review of Political Science*, Volume 13, No.1, 2010, p. 288-292; B.A. Simmons, *From Ratification to Compliance: Quantitative Evidence on the Spiral Model*, In: The Persistent Power of Human Rights: From Commitment to Compliance, Cambridge University Press, 2013, p. 43-59; E. Neumayer, Do International Human Rights Treaties Improve Respect for Human Rights?, *Journal of Conflict Resolution*, Volume 49, No. 6, 2005, p. 925-953; D.W. Hill, Estimating the Effects of Human Rights Treaties on State Behavior, *Journal of Politics*, Volume 72, 2010, p.1161-1174; Y. Lupu, The Informative Power of Treaty Commitment: Using the Spatial Model to Address Selection Effects, *American Journal of Political Science*, Volume 57, No.4, 2013, p. 912-925; Y. Lupu, Legislative Veto Players and the Effects of International Human Rights Agreements, *American Journal of Political Science*, forthcoming 2015, available at SSRN at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2516349](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516349) [Last Accessed 1 October 2015]; C.J. Fariss, Respect for Human Rights has Improved Over Time: Modeling the Changing Standard of Accountability, *American Political Science Review*, 2014, p. 1-22; C.R. Conrad and E.H. Ritter, Tenure, Treaties, and Torture: The Conflicting Domestic Effects of International Law, *Journal of Politics*, Volume 75, No. 2, 2013, p. 397-409.

<sup>136</sup> L. Camp Keith, The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behaviour?, *Journal of Peace Research*, Volume 36, No. 1, 1999, p. 95- 118; O.A. Hathaway, Do Human Rights Treaties Make a Difference?, *Yale Law Journal*, Volume 111, 2002, p. 1935-2041; R. Goodman and D. Jinks, Measuring the Effects of Human Rights Treaties, *European Journal of International Law*, Volume 14, No. 1, 2003, p. 171-183; E.M. Hafner-Burton and K. Tsutsui, Human Rights in a Globalizing World: The Paradox of Empty Promises, *American Journal of Sociology*, Volume 110, No. 5, 2005, p. 1373-1411; E.M. Hafner-Burton and K. Tsutsui, Justice Lost! The Failure of International Human Rights Law To Matter Where Needed Most, *Journal of Peace Research*, Volume 44, No. 4, 2007, p. 407-425; E.M. Hafner-Burton and J. Ron, Seeing Double: Human Rights Impact through Qualitative and Quantitative Eyes, *World Politics*, Volume 61, No. 2, 2009, p. 360-401; D.W. Hill, Estimating the Effects of Human Rights Treaties on State Behavior, *Journal of Politics*, Volume 72, 2010, p.1161-1174.

substitute for real improvements in their citizens' lives."<sup>137</sup> Hathaway argues that ratifying human rights treaties can relieve pressure for change imposed by international actors, who may rely more heavily on positions than effects in evaluating countries' records.<sup>138</sup> As a consequence, this reduction in pressure may in turn lead a ratifying State to improve its human rights practices less than it might otherwise.<sup>139</sup> According to Hathaway, ratifying States often appear less likely, rather than more likely, to conform to the requirements of the treaties than countries that do not ratify these treaties. It has, according to Hathaway, an opposite effect, because these States use treaty ratification as a shield to pursue more repressive behaviour.<sup>140</sup>

With her groundbreaking research, she shook scholarly faith in the human rights regime, especially the beliefs and assumptions of IL scholars. In the following years, more empirical studies were conducted studying the 'compliance question'. Hafner-Burton and Tsutsui found the same "disturbing trend"<sup>141</sup> as Hathaway, and they argued that many States ratify human rights treaties without the will or capability to change their behaviour in accordance with the provisions of human rights treaties, mainly because of the "strong pressures to ratify international human rights treaties and the relatively low cost of ratification."<sup>142</sup> According to Hafner-Burton and Tsutsui, the act of ratification puts a legitimate face on the State and gives States a cover to violate human rights.<sup>143</sup> Similar to Hathaway, they argue that because of the weak institutional mechanisms to enforce and monitor compliance with human rights treaties, it offers States the opportunity to ratify human rights treaties as a matter of window dressing rather than a serious commitment to implement respect for human rights in practice.<sup>144</sup> Both authors therefore conclude that treaty ratification is little more than a "paradox of empty promises".<sup>145</sup>

The majority of empirical studies focusing on the 'compliance question' did not find evidence that international human rights law has improved human rights practices on the ground. The negative research results in relation to human rights treaty compliance have drawn much attention and stirred up the academic debate about the impact of international human rights law. The study of human rights treaty compliance has been a "tremendously productive area of research"<sup>146</sup> over the past fifteen years. The empirical data now available to assess compliance is more extensive and informative than a few years ago and

<sup>137</sup> O.A. Hathaway, *Do Human Rights Treaties Make a Difference?*, *Yale Law Journal*, Volume 112, 2002, p. 2025.

<sup>138</sup> *Ibid.*, p. 2020.

<sup>139</sup> *Ibid.*

<sup>140</sup> See also O.A. Hathaway, *The Cost of Commitment*, John M. Olin Center for Studies in Law, Economics, and Public Policy Working Papers, Yale Law School, Paper 273, 2003.

<sup>141</sup> E.M. Hafner-Burton et al., *Human Rights Institutions, Membership, and Compliance*, Paper presented at the annual meeting of the Midwest Political Science Association, 2009.

<sup>142</sup> E. Hafner-Burton and K. Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, *American Journal of Sociology*, Volume 110, No. 5, 2005, p. 1402.

<sup>143</sup> *Ibid.*, p. 1402.

<sup>144</sup> *Ibid.*, p. 1378.

<sup>145</sup> *Ibid.*, p. 1378.

<sup>146</sup> B.A. Simmons, *Treaty Compliance and Violation*, *Annual Review of Political Science*, Volume 13, No.1, 2010, p. 276.



one could say that the study of human rights treaty compliance has significantly advanced.<sup>147</sup> Despite this progress made in the past years, the current empirical evidence on compliance and non-compliance with international human rights law is still rather thin and a long way from being settled, since controversies and lacunae still remain. Hathaway recognized that “we must not jump to conclusions about the worth of human rights treaties” based solely on her quantitative analysis. She writes that even if the results of her study are accurate, they do not preclude the possibility that human rights treaties have a favourable impact on human rights. She argues: “Although countries that ratify human rights treaties on the whole appear not to have better human rights practices than would otherwise be expected, treaties may have broader positive effects not captured by the analysis.”<sup>148</sup>

Analysing human rights treaty compliance is not a simple thing,<sup>149</sup> especially because human rights performance is not easily measurable. Part of the difficulty in the empirical study of the ‘compliance question’ has been methodological. Much disagreement exists on the appropriate methodological approaches and the most suitable (statistical) technique or model to be used. Kingsbury argued: “As those engaged in this work readily acknowledge, the methodological obstacles to this inquiry are severe.”<sup>150</sup> Hafner-Burton and Ron argued that there is a wide gap between qualitative and quantitative researchers, mainly because of their methodologically induced differences: “it seems that opinions are shaped, at least in part, by the choice of research method. Those working in the more established case study tradition tend toward greater optimism, while those working in the newer quantitative genre are more sceptical.”<sup>151</sup> Von Stein noted that it is obviously unsatisfactory if the answer to the question of compliance is that “it depends on the sample, or on the statistical technique being used.”<sup>152</sup> Currently, it seems that scholarly debates about the ‘compliance question’ focus more on method rather than substance.<sup>153</sup> On the one hand, IL scholars accuse IR scholars that they became

<sup>147</sup> B.A. Simmons, Treaty Compliance and Violation, *Annual Review of Political Science*, Volume 13, No.1, 2010, p. 276.

<sup>148</sup> O.A. Hathaway, Do Human Rights Treaties Make a Difference?, *Yale Law Journal*, Volume 112, 2002, p. 2020-2021.

<sup>149</sup> B.A. Simmons and D.J. Hopkins, The Constraining Power of International Treaties: Theory and Methods, *American Political Science Review*, Volume 99, No. 4, 2005, p. 623.

<sup>150</sup> B. Kingsbury, The Concept of Compliance as a Function of Competing Conceptions of International Law, *Michigan Journal of International Law*, Volume 19, 1998, p. 347.

<sup>151</sup> E.M. Hafner-Burton and J. Ron, Seeing Double: Human Rights Impact through Qualitative and Quantitative Eyes, *World Politics*, Volume 61, No. 2, 2009, p. 363.

<sup>152</sup> J. von Stein, *International Law: Understanding Compliance and Enforcement*, in: R. Denemark, *International Studies Compendium*, Wiley-Blackwell, 2010.

<sup>153</sup> B.A. Simmons and D.J. Hopkins, The Constraining Power of International Treaties: Theory and Methods, *American Political Science Review*, Volume 99, No. 4, 2005, p. 623-631; B.A. Simmons, *From Ratification to Compliance: Quantitative Evidence on the Spiral Model*, In: *The Persistent Power of Human Rights: From Commitment to Compliance*, Cambridge University Press, 2013, p. 43-59; E.M. Hafner-Burton, A Social Science of Human Rights, *Journal of Peace Research*, Volume 51, No. 2, 2014, p. 273-286; G. Shaffer and T. Ginsburg, The Empirical Turn in International Legal Scholarship, *The American Journal of International Law*, Volume 106, No. 1, January 2012, p. 19-25; J. Goldsmith, Sovereignty, International Relations Theory, and International Law, *Stanford Law Review*, Volume 52, 2000, p. 984; W.C. Bradford, A Behavioralist Theory of Compliance with the Laws of War, *International Legal Theory*, Volume 11, 2005, p. 7; S.D. Krasner, *Sovereignty: Organized Hypocrisy*,

too obsessed with methodological rigor. On the other hand, IL scholars often do not specify the assumptions underlying their analysis and that leads, according to IR scholars, to “methodological unsophistication.”<sup>154</sup> IR scholars also accuse IL scholars that they do not take empirical work seriously: “They rarely do case studies to test the claims of descriptive inference or causality that underlie so much of their work.”<sup>155</sup>

## 5 RESEARCH QUESTIONS

Taking into account the above, the state of the art in current research is clear. Theoretical explanations in relation to the ‘compliance question’ point in different directions and systematic empirical evidence on human rights treaty compliance is still rather limited and coloured by methodological difficulties. Simmons therefore concluded that we are still “a long way theoretically and empirically from an understanding of the conditions under which governments comply with international agreements.”<sup>156</sup>

This research will dive into this current gap in existing literature. In the first place, this research will map the development of IL and IR theories explaining compliance and non-compliance with international (human rights) law from the 1960s up to now. More specifically, the different factors that follow from these IL and IR theories that provide a possible answer to the ‘compliance question’ will be analyzed. In the second place, this research will empirically address the ‘compliance question’ in relation to the practice of FGM/C by conducting a case study in Senegal.<sup>157</sup> However, the empirical data achieves significance when viewed in relation to theoretical concerns.<sup>158</sup> Peters explains for example that compliance research is both empirical research, as well as theory-based research.<sup>159</sup> She refers to Shaffer and Ginsburg who have called this “emergent analytics”, which they define as “analytics that oscillate between empirical finding, real-world testing, and back again.”<sup>160</sup> In this way, theoretical engagement becomes part of “a dynamic, recurrent, interactive process with empirical assessment of international law in action.”<sup>161</sup> As social theorist Merton wrote, “empirical research goes far beyond the passive role of verifying and testing theory: it does more than confirm or refute hypotheses. Research plays

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Princeton University Press, 1999, p. 116-117; R. Goodman and D. Jinks, Measuring the Effects of Human Rights Treaties, *European Journal of International Law*, Volume 14, No. 1, 2003, p. 171-183.

<sup>154</sup> J. Goldsmith, Sovereignty, International Relations Theory, and International Law, *Stanford Law Review*, Volume 52, 2000, p. 984.

<sup>155</sup> S.D. Krasner, *Sovereignty: Organized Hypocrisy*, Princeton University Press, 1999, p. 114-115.

<sup>156</sup> B.A. Simmons, Compliance With International Agreements, *Annual Review of Political Science*, Volume 1, No.1, 1998, p. 91.

<sup>157</sup> Section 7 of this chapter will provide more information on the methodology used in this research, as well as the selection criteria and the justifications why Senegal was selected as a case study.

<sup>158</sup> A. Peters, Realizing Utopia as a Scholarly Endeavour, *The European Journal of International Law*, Volume 24, No. 2, 2013, p. 547.

<sup>159</sup> A. Peters, Realizing Utopia as a Scholarly Endeavour, *The European Journal of International Law*, Volume 24, No. 2, 2013, p. 547.

<sup>160</sup> G. Shaffer and T. Ginsburg, Empirical Turn in International Legal Scholarship, *American Journal of International Law*, Volume 106, No. 1, 2012, p. 1.

<sup>161</sup> *Ibid.*

an active role: It initiates, it reformulates, it deflects, and it clarifies theory.”<sup>162</sup> Therefore, the data gathered in the field will be connected with the theories developed by IL and IR scholars in Chapter VI.

The central research question of this research is the following:

**Which factors explain compliance and/or non-compliance with the human rights framework in relation to the practice of Female Genital Mutilation/Cutting in Senegal?**

This central research question is sub-divided into the following five sub-questions:

1. *Which factors follow from international law and international relations theories that explain compliance and non-compliance with international law in general and the human rights framework in particular?*
2. *What does the practice of Female Genital Mutilation/Cutting entail?*
3. *Which human rights are being violated with the practice of Female Genital Mutilation/Cutting?*
4. *What are the duties of States (and non-State actors) concerning Female Genital Mutilation/Cutting prescribed by the human rights framework?*
5. *To what extent is Senegal in compliance with the human rights framework in relation to Female Genital Mutilation/Cutting, and which factors explain compliance and/or non-compliance with this framework?*

## **6 RESEARCH OBJECTIVES AND CONTRIBUTIONS**

The objective motivating this study is to contribute to the ‘body of knowledge’ concerning compliance with international human rights law, especially in relation to the practice of FGM/C, by employing an innovative research design. Although most scholars empirically studying the ‘compliance question’ have adopted a quantitative approach, and some scholars therefore claim that there is a trend towards the “quantification” of the study of international law,<sup>163</sup> in this research the ‘compliance question’ was qualitatively addressed by conducting a case study in Senegal. Simmons argued that innovative research designs “will help to deepen our knowledge about what makes international law compliance especially problematic (or not).”<sup>164</sup> That is exactly the objective of this research. As the previous sections have shown, the compliance literature has advanced considerably in recent years. Von Stein argues that we have “a better – though admittedly still incomplete – understanding” of the

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<sup>162</sup> R.K. Merton, *Social Theory and Social Structure*, Free Press, 1968, p. 157.

<sup>163</sup> J. von Stein, *International Law: Understanding Compliance and Enforcement*, in: R. Denemark, *International Studies Compendium*, Wiley-Blackwell, 2010, p. 5.

<sup>164</sup> B.A. Simmons, Treaty Compliance and Violation, *Annual Review of Political Science*, Volume 13, No. 1, 2010, p. 45.

mechanisms that underlie compliance.<sup>165</sup> In addition, she explains that: “Scholars are taking seriously the proposition that States comply for reasons other than expectations of enforcement, which is leading to a richer understanding of how international law works.”<sup>166</sup>

Drawing on theories of IL and IR and by conducting an extensive empirical study in Senegal, this study will enrich our understanding of how and the conditions under which, international law in general and the human rights framework in particular works. More specifically, this research explores when, where, and to what extent the human rights framework is complied with or violated in relation to the practice of FGM/C. The intention of this research is to narrow the gap between abstract theory, empirical research, and the world of practice. This research aims to contribute to both relevant bodies of theory, as well as to current practice in relation to FGM/C. This research will lead to a better understanding of the problems related to the ‘compliance question’ and how they can be addressed, since this study will provide valuable insights for promoting human rights compliance.

The issue of generalization is important to both these aims. Because how can you generalize from a single case? This is a common concern in case study research.<sup>167</sup> Senegal is selected as case study, but this country has not been chosen as a representative sample of all countries where FGM/C exists. However, the case study in Senegal can be viewed as a ‘critical case’,<sup>168</sup> which can serve to falsify the assumed compliance with the human rights framework by IL scholars, while similarly calling into question the extent to which States – in this case Senegal – comply with the human rights framework. The outcome of the analysis and the insights that will be provided in this case study might be applicable for comparable countries (democratic States with a strong civil society) as well.

The outcome of this research will be an incentive for the UN, the AU and States (especially Senegal) to have a closer look at their (ratified) human rights instruments and documents and their compliance strategies at the international, regional and national level. This study might contribute to improvement of existing approaches towards compliance with the human rights framework in relation to the elimination of the practice of FGM/C.

This research does not only target academia (including IL scholars, IR scholars and social scientists), but also other actors (practitioners, government officials, international organizations, CSOs) who are involved in the day-to-day struggle of implementing human rights (in relation to the practice of FGM/C) at the national level. This research will also have practical relevance to the work of international organisations, especially to the UN and AU Treaty Monitoring Bodies.

<sup>165</sup> J. von Stein, *International Law: Understanding Compliance and Enforcement*, in: R. Denemark, *International Studies Compendium*, Wiley-Blackwell, 2010, p. 5.

<sup>166</sup> *Ibid.*

<sup>167</sup> R.K. Yin, *Case Study Research: Design and Methods*, Sage Publications, 2013, p. 20.

<sup>168</sup> L.P. Riddin, You Can Generalize Stupid! Social Scientists, Bent Flyvbjerg, and Case Study Methodology, *Qualitative Inquiry*, Volume 12, 2006, p. 803.

## 7 METHODOLOGY

### 7.1 Combination of research methods

Taking into account the socio-legal nature of this research, a combination of research methods is required. Traditional legal research methods revolving around the study and interpretation of primary legal resources (e.g. legislation, case law) and secondary legal resources (e.g. literature) are combined with research methods and techniques of social sciences. Desk research is combined with empirical research in Senegal. More specifically, a qualitative case study research strategy is used and the main methods of data collection are document analysis and semi-structured interviews. The methodology applied for the desk research and empirical research are explained more in detail in Chapter II (literature review), Chapter IV (legal analysis) and V (empirical study). Section 7.4 below will explain why Senegal is selected as the case study country.

### 7.2 Interdisciplinary research

This research is interdisciplinary, since no single discipline has all the answers to the rather complex ‘compliance question’. Cardenas explained: “The study of compliance itself has been approached from virtually every social science discipline and the field of law.”<sup>169</sup> The issue of compliance itself is already interdisciplinary and taking an interdisciplinary approach enables to fully grasp the conditions under which the human rights framework does (or does not) work in a particular context, specifically in relation to the practice of FGM/C. Interdisciplinary research involves several unrelated<sup>170</sup> academic source disciplines in a way that forces them to cross subject boundaries to create new knowledge and theory and solve a common research goal.<sup>171</sup> The aim of interdisciplinary research is to create a common understanding of a complex issue or ‘real world’ problem<sup>172</sup> (in this case the ‘compliance question’ in relation to the practice of FGM/C) and to seek coherence between the knowledge produced by different disciplines.<sup>173</sup> This research ultimately aims to bridge legal scholarship with other disciplines in order to provide a platform for generating new insights and to contribute to complex problem solving. By doing so, this research touches upon three disciplines, i.e. law (more specifically international human rights law), political science (more specifically the subfield international relations) and social science (more specifically the subfield

<sup>169</sup> S. Cardenas, *National Human Rights Institutions and State Compliance*, in: R. Goodman and T. Pegram, *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions*, Cambridge University Press, 2012, p. 30.

<sup>170</sup> By ‘unrelated’, Tress et al mean that they have contrasting research paradigms e.g. the differences between qualitative and quantitative approaches or between analytical and interpretative approaches that bring together different disciplines.

<sup>171</sup> J. Tress et al., Publishing Integrative Landscape Research: Analysis of Editorial Policies of Peer-Reviewed Journals, *Environmental Science & Policy*, Volume 9, No. 5, August 2006, p. 466-475.

<sup>172</sup> J.T. Klein, Interdisciplinary Approaches in Social Science Research, in: W. Outwaite and S.P. Turner, *The Sage Handbook of Social Science Methodology*, Sage Publications, 2007, p. 37-38.

<sup>173</sup> J. Petts et al., Crossing Boundaries: Interdisciplinarity in the Context of Urban Environments, *Geoforum*, Volume 39, 2008, p. 596.

anthropology). However, the main approach in this research is legal and the other two disciplines are supplementary. This research draws ideas, insights, concepts, elements, terminology, theories and methods of these three disciplines and it integrates their insights.<sup>174</sup>

### 7.3 Criteria for country selection

When taking into account the problems described in section 2 of this chapter, the portents of the level of compliance with the human rights framework in relation to the practice of FGM/C are not very positive. For that reason, it was decided that a country should be selected for this case study where all ingredients are present to expect compliance with the human rights framework in relation to the practice of FGM/C. Four selection criteria are used to determine which country would be most interesting and best suited for this research. The selection criteria will be discussed in the four sub-sections below.

#### 7.3.1 Prevalence rate

In the first place, the practice of FGM/C should be prevalent in the country selected for this case study. Nationally representative data on FGM/C prevalence are mainly available from two sources: Demographic and Health Surveys (DHS) and Multiple Indicator Cluster Surveys (MICS).<sup>175</sup> The DHS defined prevalence of FGM/C as “the percentage of girls and women of reproductive age (15 to 49 years old) who have experienced any form of FGM/C.”<sup>176</sup> The national prevalence of FGM/C has been measured using a standard survey method developed by the DHS of Macro International (now ICF International). DHS surveys collect data from nationally representative probability samples of households and from adult women and men in the sampled households in over 90 countries.<sup>177</sup> A module of FGM/C questions is added to the DHS Women’s Questionnaire in several countries. Since 2000, UNICEF’s Multiple Indicator Cluster Surveys (MICS) have used a similar module to collect information on FGM/C. Both DHS surveys and MICS surveys provide FGM/C prevalence data for 27 countries in Africa, as well as in Yemen and Iraq.<sup>178</sup> Although there is growing evidence that FGM/C is also prevalent in other countries in the Middle East and Asia, no nationally representative data on FGM/C is available in these countries.<sup>179</sup> Therefore, I am forced to choose one of the 29 countries for which there is data.

<sup>174</sup> W. Newall, *A Theory of Interdisciplinary Studies, Issues in Integrative Studies*, Volume 19, 2001, p. 1-25.

<sup>175</sup> Other nationally representative household surveys with questions on FGM/C include the Family Health Surveys, conducted by the Pan Arab Project for Family Health in Djibouti (2002) and Yemen (2003), the Ethiopian Welfare Monitoring Survey (2011) and the Zambia Sexual Behaviours Surveys (1998-2009).

<sup>176</sup> Unfortunately, reliable prevalence figures for girls aged 0-15 years do not exist, and neither are data available through the DHS and MICS for prevalence in Asian countries where FGM/C is practiced, see P.S. Yoder and S. Khan, *Number of Women Circumcised in Africa: The Production of a Total*, DHS Working Papers, No. 39, USAID, Calverton, March 2008, p. 3.

<sup>177</sup> *Ibid.*, p. 4.

<sup>178</sup> *Ibid.*

<sup>179</sup> See Chapter III, section 6.2 of this research.

The DHS and MICS surveys show that FGM/C prevalence rates vary significantly across these 29 countries. In order to clarify these differences, UNICEF developed groupings by FGM/C prevalence levels, which are presented in table 1.2.<sup>180</sup>

Table 1.2 National FGM/C prevalence per country

Country	
High prevalence	Somalia (98%), Guinea (96%), Djibouti (93%), Egypt (91%), Eritrea (89%), Mali (89%), Sierra Leone (88%), Sudan (88%)
Moderately high prevalence	Gambia (76%), Burkina Faso (76%), Ethiopia (74%), Mauritania (69%), Liberia (66%)
Moderately low prevalence	Guinea-Bissau (50%), Chad (44%), Cote d'Ivoire (38%), Kenya (27%), Nigeria (27%), Senegal (25%) <sup>181</sup>
Low prevalence	Central African Republic (24%), Yemen (23%), Tanzania (15%), Benin (13%)
Very low prevalence	Iraq (8%), Ghana (4%), Togo (4%), Niger (2%), Cameroon (1%), Uganda (1%)

### 7.3.2 Treaty ratification

In the second place, the human rights framework in relation to the practice of FGM/C should be applicable in the country selected for this case study. An important characteristic of international law is the “voluntary” nature of the legal obligation, since States cannot not bound by international law against their will. Only if States ratify a human rights treaty, they are bound by the legal provisions set forth in the treaty (unless the provision forms part of customary international law).<sup>182</sup> Ratification is necessary for the treaty to come into force.<sup>183</sup>

<sup>180</sup> United Nations Children's Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 27.

<sup>181</sup> Agence Nationale de la Statistique et de la Démographie [Sénégal], et ICF International, *Sénégal: Enquête Démographique et de Santé Continue (EDS-Continue 2014)*, ANSD et ICF International, 2015, p. 95-104.

<sup>182</sup> Customary international law refers to international obligations arising from established state practice, as opposed to obligations arising from formal written international conventions. Article 38(1) of the Statute of the International Court of Justice defines “international custom” as one of the sources of international law and describes it as “evidence of a general practice accepted as law,” see United Nations, *Statute of the International Court of Justice*, 18 April 1946, Article 38(I). It is generally agreed that customary international law can be established by the presence of two elements: state practice and *opinio juris*.

It establishes a State's consent to be bound by the international agreement and leads to a legally binding obligation under international law. Therefore, the country selected for this case study should have ratified all the human rights treaties that are important in relation to the practice of FGM/C. More specifically, this means that the State should have ratified CEDAW and CRC at the UN level. If an African country is selected, the State should have ratified the ACHPR, ACRWC, AYC and the Maputo Protocol. Especially the ratification of the Maputo Protocol is essential, since this is the only legally binding human rights instrument applicable in Africa in which FGM/C is specifically mentioned.<sup>184</sup>

In addition, the country selected for this case study should not have made any reservations to the human rights treaties mentioned above that are relevant in relation to the practice of FGM/C that attempt to limit or modify the scope of the ratifying States' obligations. As defined by the Vienna Convention on the Law of Treaties, a reservation is "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."<sup>185</sup>

States make reservations upon ratification of international treaties in which they declare under which conditions they consider themselves to be bound by a certain treaty. Article 19-21 of the Vienna Convention allows States to enter reservations and contains provisions on the procedure for entering reservations. Article 19 of the Vienna Convention provides for example that States may formulate a reservation unless the reservation is "incompatible with the object and purpose of the treaty."<sup>186</sup> A large number of reservations are made in relation to human rights treaties (as opposed to other areas of international law such as criminal, trade, investment, and environmental law).<sup>187</sup> Most reservations have been made to the CEDAW, since a number of Islamic countries require that the respective human rights treaty provisions be interpreted in light of Islamic law.<sup>188</sup> However, when assessing the 'compliance question' in relation to human rights law, it is essential that the country selected for this case study accepted the human rights framework in relation to the practice of FGM/C as a whole.<sup>189</sup>

<sup>183</sup> There is a difference between signing and ratifying a treaty. When signing a human rights treaty, a state declares that it has agreed upon the content of the treaty, and intends to work towards its implementation. However, this does not lead to a legally binding obligation under international law.

<sup>184</sup> See Chapter IV, section 7.2.1 of this research.

<sup>185</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, Volume 1155, p. 331, Article 2 (1)(d).

<sup>186</sup> *Ibid*, Article 19 (c).

<sup>187</sup> L.R. Helfer, *Exiting Treaties*, *Virginia Law Review*, Volume 91, 2005, p. 1641; D.W. Hill, *Avoiding Obligation: Reservations to Human Rights Treaties*, *Journal of Conflict Resolution*, Volume 12, 2015, p. 2.

<sup>188</sup> M.A. Freeman, *Reservations to CEDAW: An Analysis for UNICEF*, Discussion Paper, Gender, Rights and Civic Engagement Section, Division of Policy and Practice, New York, December 2009. Available at [http://www.unicef.org/gender/files/Reservations\\_to\\_CEDAW-an\\_Analysis\\_for\\_UNICEF.pdf](http://www.unicef.org/gender/files/Reservations_to_CEDAW-an_Analysis_for_UNICEF.pdf) [Last Accessed 1 October 2015].

<sup>189</sup> E. Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, *Journal of Conflict Resolution*, Volume 49, No. 6, 2005, p. 951; E. Neumayer, *Qualified Ratification:*



### 7.3.3 Level of democracy

In the third place, the country selected for this case study should have a high level of democracy. Various studies found that democratic States are less likely to commit human rights violations and are more likely to comply with human rights law and pointed in their studies<sup>190</sup> to positive effects of democracy on human rights practices. Hathaway found empirical evidence suggesting that fully democratic States are more likely than other States to comply with the human rights treaties they have ratified and can be associated with a better human rights record.<sup>191</sup> Neumayer has found the same pattern.<sup>192</sup>

The 'Democracy Index' (DI)<sup>193</sup> is an index compiled by the Economist Intelligence Unit, which measures the state of democracy in 167 countries. The index is based on 60 indicators grouped in five different categories: electoral process and pluralism, civil liberties, functioning of government, political participation, and political culture.<sup>194</sup> In addition to a numeric score and a ranking, the index categorizes countries as one of four regime types: full democracies, flawed democracies, hybrid regimes and authoritarian regimes.<sup>195</sup>

The 'Freedom House Index' (FHI)<sup>196</sup> evaluates the state of freedom in 195 countries and 15 territories. The index assesses the "real-world rights and

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Explaining Reservations to International Human Rights Treaties, *Journal of Legal Studies*, Volume 36, No. 2, 2007, p. 397.

<sup>190</sup> B. Bueno de Mesquita et al., Thinking Inside the Box: A Closer Look at Democracy and Human Rights, *International Studies Quarterly*, Volume 49, No. 3, 2005, p. 439-458; C. Davenport, Multi-Dimensional Threat Perception and State Repression: An Inquiry Into Why States Apply Negative Sanctions, *American Journal of Political Science*, Volume 39, No. 3, 1995, p. 683-713; C. Davenport, Human Rights and the Democratic Proposition, *Journal of Conflict Resolution*, Volume 43, No. 1, 1999, p. 92-116; C. Davenport and D.A. Armstrong II, Democracy and the Violation of Human Rights: A Statistical Analysis from 1976 to 1996, *American Journal of Political Science*, Volume 48, No. 3, 2004, p. 538-554; C. Davenport, *State Repression and the Domestic Democratic Peace*, Cambridge University Press, 2007; B. Harff, Barbara, No Lessons Learned from the Holocaust: Assessing Risks of Genocide and Political Mass Murder Since 1955, *American Political Science Review*, Volume 97, No. 1, 2003, p. 57-74; C. Henderson, Conditions Affecting the Use of Political Repression, *Journal of Conflict Resolution*, Volume 35, 1991, p. 120-142; D.W. Hill and Z.M. Jones, An Empirical Evaluation of Explanations for State Repression, *American Political Science Review*, Volume 108, No. 3, 2014, p. 661-687; J.M. McCormick and N.J. Mitchell, Human Rights Violations, Umbrella Concepts, and Empirical Analysis, *World Politics*, Volume 49, No. 4, 1997; S.C. Poe and C.N. Tate, Repression of Human Rights to Personal Integrity in the 1980s: A Global Analysis, *American Political Science Review*, Volume 88, No. 4, 1994; S.C. Poe et al., Repression of the Human Right to Personal Integrity Revisited: A Global, Cross-National Study Covering the Years 1976-1993, *International Studies Quarterly*, Volume 43, No. 2, 1999, p. 291-313.

<sup>191</sup> O.A. Hathaway, Do Human Rights Treaties Make a Difference?, *Yale Law Journal*, Volume 112, 2002, p. 2020.

<sup>192</sup> E. Neumayer, Do International Human Rights Treaties Improve Respect for Human Rights?, *Journal of Conflict Resolution*, Volume 49, No. 6, 2005, p. 951.

<sup>193</sup> The Economist Intelligence Unit, *Democracy Index 2014*, *Democracy and its Discontents*, 2014, available at <http://www.sudestada.com.uy/Content/Articles/421a313a-d58f-462e-9b24-2504a37f6b56/Democracy-index-2014.pdf> [Last Accessed 1 October 2015].

<sup>194</sup> *Ibid.*, p. 1.

<sup>195</sup> For more information on the methodology, see The Economist Intelligence Unit, *Democracy Index 2014*, *Democracy and its Discontents*, 2014, p. 37-49, available at <http://www.sudestada.com.uy/Content/Articles/421a313a-d58f-462e-9b24-2504a37f6b56/Democracy-index-2014.pdf> [Last Accessed 1 October 2015].

<sup>196</sup> Freedom House, *Freedom in the World 2015*, *Discarding Democracy: Return to the Iron Fist*, 2015, available at [https://freedomhouse.org/sites/default/files/01152015\\_FIW\\_2015\\_final.pdf](https://freedomhouse.org/sites/default/files/01152015_FIW_2015_final.pdf) [Last Accessed 1 October 2015].

freedoms enjoyed by individuals, rather than governments or government performance per se.”<sup>197</sup> The index is based on 25 indicators, and the average of a country or territory’s political and civil liberties ratings determine whether it is free, partly free, or not free.<sup>198</sup>

#### 7.3.4 Strength of civil society

In the fourth place, the country selected for this case study should have a strong civil society. Various studies found that compliance with human rights treaties is conditional on the strength of civil society. According to these scholars, a strong civil society in a country improves respect for human rights and has a positive impact on treaty compliance.<sup>199</sup>

The ‘Civil Society Index’ (CSI)<sup>200</sup> is an index developed by the World Alliance for Citizen Participation (CIVICUS), an alliance of civil society organizations with members in over 100 countries. CIVICUS adopted a functional definition of civil society as “the arena, outside of the family, the State and the market where people associate to advance common interests.”<sup>201</sup> The aim of CSI is to assess the state of civil society in countries around the world.

#### 7.4 Why Senegal is selected

In total, 27 countries in Africa and two countries in the Middle East would be eligible as a case study country when the first selection criterion is taken into account. Preferably, a country in the ‘high prevalence’, ‘moderately high prevalence’ or ‘moderately low prevalence’ category will be selected.

All 29 countries where FGM/C is prevalent have signed the CRC, and only two countries (Somalia and Sudan) have not signed the CEDAW.<sup>202</sup> Of the 27 African countries where FGM/C is prevalent, all countries have signed and ratified the ACHPR.<sup>203</sup> In total, 24 of the 27 African countries where FGM/C is prevalent have ratified the ACRWC.<sup>204</sup> The Central African Republic, Djibouti and Somalia have signed the ACRWC, but have not ratified it. Of the 27 African

<sup>197</sup> Freedom House, *Freedom in the World 2015, Discarding Democracy: Return to the Iron Fist*, 2015, p. 2, available at [https://freedomhouse.org/sites/default/files/01152015\\_FIW\\_2015\\_final.pdf](https://freedomhouse.org/sites/default/files/01152015_FIW_2015_final.pdf) [Last Accessed 1 October 2015].

<sup>198</sup> Ibid.

<sup>199</sup> E. Hafner-Burton and K. Tsutsui, Human Rights in a Globalizing World: The Paradox of Empty Promises, *American Journal of Sociology*, Volume 110, No. 5, 2005, p. 1402; E. Neumayer, Do International Human Rights Treaties Improve Respect for Human Rights?, *Journal of Conflict Resolution*, Volume 49, No. 6, 2005, p. 951.

<sup>200</sup> V. Keinrich and L. Fioramonti, *CIVICUS Global Survey of the State of Civil Society: Comparative Perspectives*, Kumarian Press, 2007.

<sup>201</sup> Ibid, p. 378.

<sup>202</sup> As of 1 October 2015, see United Nations Treaty Collection, *Chapter IV: Human Rights*, available at <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> [Last Accessed 1 October 2015].

<sup>203</sup> As of 1 October 2015, African Commission on Human and Peoples’ Rights, *Ratification Table: African Charter on Human and People’s Rights*, available at <http://www.achpr.org/instruments/achpr/ratification/> [Last Accessed 1 October 2015].

<sup>204</sup> As of 1 October 2015, African Union, *ACRWC Ratifications Table*, available at <http://pages.au.int/acerwc/pages/acerwc-ratifications-table> [Last Accessed 1 October 2015].

countries where FGM/C is prevalent, 18 have ratified the AYC<sup>205</sup> and 18 have ratified the Maputo Protocol.<sup>206</sup>

The following 17 countries have ratified all human rights treaties that are important in relation to the practice of FGM/C: Burkina Faso, Cameroon, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Iraq, Kenya, Mali, Mauritania, Nigeria, Senegal, Tanzania, Togo, Uganda and Yemen. Table 1.3 below provides a detailed overview of the ratifications of human rights treaties per country where FGM/C is prevalent.

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<sup>205</sup> As of 1 October 2015, African Union, *List of Countries which have Signed, Ratified/Acceded to the African Youth Charter*, available at <http://au.int/en/sites/default/files/youth%20Charter.pdf> [Last Accessed 1 October 2015].

<sup>206</sup> As of 1 October 2015, African Commission on Human and Peoples' Rights, *Ratification Table: Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, available at <http://www.achpr.org/instruments/women-protocol/ratification/> [Last Accessed 1 October 2015].

Table 1.3 Ratifications of human rights treaties

	CEDAW	CRC	ACHPR	ACRWC	AYC	Maputo Protocol
Benin	✓	✓	✓	✓		✓
Burkina Faso	✓	✓	✓	✓	✓	✓
Cameroon	✓	✓	✓	✓	✓	✓
CAR	✓	✓	✓			
Chad	✓	✓	✓	✓	✓	
Cote d'Ivoire	✓	✓	✓	✓	✓	✓
Djibouti	✓	✓	✓		✓	✓
Egypt	✓	✓	✓	✓		
Eritrea	✓	✓	✓	✓		
Ethiopia	✓	✓	✓	✓		
Gambia	✓	✓	✓	✓	✓	✓
Ghana	✓	✓	✓	✓	✓	✓
Guinea	✓	✓	✓	✓	✓	✓
Guinea-Bissau	✓	✓	✓	✓	✓	✓
Iraq	✓	✓	N/A	N/A	N/A	N/A
Kenya	✓	✓	✓	✓	✓	✓
Liberia	✓	✓	✓	✓		✓
Mali	✓	✓	✓	✓	✓	✓
Mauritania	✓	✓	✓	✓	✓	✓
Niger	✓	✓	✓	✓	✓	
Nigeria	✓	✓	✓	✓	✓	✓
Senegal	✓	✓	✓	✓	✓	✓
Sierra Leone	✓	✓	✓	✓		
Somalia		✓	✓			
Sudan		✓	✓	✓		
Tanzania	✓	✓	✓	✓	✓	✓
Togo	✓	✓	✓	✓	✓	✓
Uganda	✓	✓	✓	✓	✓	✓
Yemen	✓	✓	N/A	N/A	N/A	N/A

Taking into account the third criterion, there is among the 29 countries where FGM/C is prevalent no “full democracy”<sup>207</sup> according to the ‘Democracy Index’ of the Economist Intelligence Unit. Only two out of the 29 countries where FGM/C is prevalent are earmarked as a “flawed democracy,”<sup>208</sup> namely Ghana and Senegal. Countries with a “hybrid regime” include Mali, Tanzania, Benin, Uganda, Kenya and Iraq.<sup>209</sup> According to the ‘Freedom House Index’, there are three “free” countries out of the 29 where FGM/C is prevalent, namely Benin, Ghana and Senegal.<sup>210</sup> Table 1.4 provides an overview of the overall scores of these countries in relation to the level of democracy.

Table 1.4 Level of democracy per country

Country	Democracy Index 2014 (out of 10)	Freedom House Index 2015 (out of 7)
Benin	5.65	2.0
Ghana	6.33	1.5
Iraq	4.23	6.0
Kenya	5.13	4.0
Mali	5.79	4.5
Senegal	6.15	2.0
Tanzania	5.77	3.0
Uganda	5.22	5.5

Taking into account the fourth criterion, the state of civil society of both Ghana and Senegal was assessed, since these two countries are the only “flawed democracies” where FGM/C is prevalent, according to the ‘Democracy Index’. Although Benin is according to the ‘Freedom House Index’ a “free” country, the State has not ratified the AYC and is therefore not selected. Ghana scores according to the CSI of CIVICUS on average 1.7 (structure 1.3, environment 1.5, values 2.0 and impact 2.0), while Senegal scores on average slightly less, namely 1.68 (structure 1.5, environment 1.2, values 2.1 and impact 1.9). Nevertheless, Senegal was selected as the case study country, since the FGM/C prevalence

<sup>207</sup> The only “full democracy” at the African continent is the Indian Ocean island of Mauritius. However, FGM/C is not prevalent in Mauritius.

<sup>208</sup> Other countries at the African continent with a “flawed democracy” are Botswana (DI: 7.87, FHI: 3)), Cape Verde (DI: 7.81, FHI: 1), Lesotho (DI: 6.66, FHI: 2), Namibia (DI: 6.24, FHI: 2), South Africa (DI: 7.82, FHI: 2), Zambia (DI: 6.39, FHI: 3,5). However, FGM/C is not prevalent in these countries.

<sup>209</sup> Democracy Index 2014, *Democracy and its Discontents, a Report from The Economist Intelligence Unit*, p. 3-8, available at <http://www.sudestada.com.uy/Content/Articles/421a313a-d58f-462e-9b24-2504a37f6b56/Democracy-index-2014.pdf> [Last Accessed 1 October 2015].

<sup>210</sup> Freedom House, *Freedom in the World 2015, Discarding Democracy: Return to the Iron Fist*, 2015, available at [https://freedomhouse.org/sites/default/files/01152015\\_FIW\\_2015\\_final.pdf](https://freedomhouse.org/sites/default/files/01152015_FIW_2015_final.pdf) [Last Accessed 1 October 2015].

rate is much higher in Senegal compared to Ghana (25%<sup>211</sup> versus 4%). Senegal is a ‘moderately low prevalence’ country, while Ghana is a ‘very low prevalence’ country (see table 1.2). In Senegal, 25% of girls and women aged 15 to 49 have undergone FGM/C. Senegal has ratified all human rights treaties that are important in relation to the practice of FGM/C (see table 1.3). Senegal did not make any reservations to the treaties they have ratified, neither at the UN, nor at the AU level.<sup>212</sup> Senegal is considered a “flawed democracy” and is also a country with a strong civil society. According to the ‘Civil Society Index’ of CIVICUS, Senegalese civil society has “a strong value base for taking action.” In addition, the CIVICUS country report of Senegal concluded that civil society in Senegal “has a noticeable impact on democracy and development.”<sup>213</sup>

Senegal is also an interesting country to study, since the Civil Society Organization (CSO) Tostan is based in Senegal. Tostan is one of the first, and perhaps best-known CSO’s for their grassroots efforts in FGM/C abandonment. Established in 1991, Tostan, which means “breakthrough” in Wolof (one of the local languages in Senegal), has implemented its Community Empowerment Program (CEP) in thousands of communities in Senegal. Tostan’s three-year programme is designed to empower communities through education on human rights, leading to social change. Their mission is to empower African communities to bring about sustainable development and positive social transformation based on respect for human rights.

## 8 TERMINOLOGY

### 8.1 Compliance

Before dealing with the question when and why States comply with the human rights framework, it is essential to define the concept of compliance and to distinguish it from implementation and effectiveness (or impact).<sup>214</sup> There are many overlaps and links between these concepts, but they do have a different meaning and focus. For example, an international human rights treaty could on the one hand be perfectly implemented, but still be ineffective in attaining its objectives. On the other hand, compliance can also occur without implementing international law provisions.

In this research, the concept of *compliance* is defined as “a state of conformity between an actor’s behaviour and a legal rule,”<sup>215</sup> or what Risse and Sikkink call

<sup>211</sup> Agence Nationale de la Statistique et de la Démographie [Sénégal], et ICF International. *Enquête Démographique et de Santé à Indicateurs Multiples au Sénégal (EDS-MICS) 2010-2011*, ANSD et ICF International, 2012, p. 294-295.

<sup>212</sup> Senegal made only one declaration with the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in Armed Conflict (OP-CRC-AC).

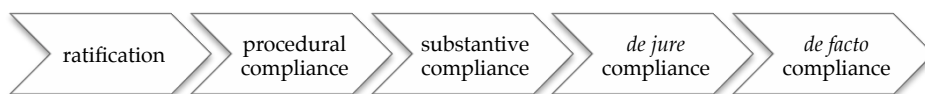
<sup>213</sup> M. Mbaye, *Engaging Together for Real Change*, CIVICUS Civil Society Index Analytical Country Report for Senegal, 2011, p. 65, available at <http://civicus.org/downloads/CSI/Senegal.pdf> [Last Accessed 1 October 2015].

<sup>214</sup> W. Carlsnaes et al., *Handbook of International Relations*, Sage, 2012, p. 553.

<sup>215</sup> See also M. Faure et al., *Environmental Enforcement Networks: Concepts, Implementation and Effectiveness: New Horizons in Environmental and Energy Law Series*, Edward Elgar Publishing, 2015, p. 74; K. Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, *Case Western Reserve Journal of International Law*, Volume 32, 2000, p. 391; K. Raustiala and A. Slaughter, *International Law, International Relations and Compliance*, in: W. Carlsnaes et al., *Handbook of*

“rule-consistent behaviour.”<sup>216</sup> Thus, according to this definition, *non-compliance* or *violation* occurs when an actor’s behaviour is not in correspondence with a legal rule.<sup>217</sup> Legal rules in this study include both legally binding rules or laws, and non-binding legal rules (see section 8.2 below). Actors include both States and non-State actors, depending on the subjects of the legal rule, or in other words: to whom the legal rules are addressed. In case of the human rights framework, Kent distinguished five stages of international and national compliance: (1) ratification of (or accession to) human rights treaties, the acceptance of norms that this entails, and the acceptance that treaty bodies monitor the implementation of human rights treaties; (2) procedural compliance, including submitting reports to the human rights treaty bodies and other requirements; (3) substantive compliance, including conforming to the human rights standards in the treaties and by implementing the human rights treaty bodies’ recommendations; (4) *de jure* compliance, including the implementation of international norms in national legislative provisions; and (5) *de facto* compliance, or compliance at the national level.<sup>218</sup> This research will look at all five stages of compliance.

Figure 1.1 Five stages of compliance



While compliance entails an actual change in behaviour, *implementation* in this study refers to measures taken by States to put international norms into effect in its national laws (*de jure* compliance). Implementation is often an essential step towards (*de facto*) compliance.<sup>219</sup>

In turn, *effectiveness* goes beyond implementation and compliance and is defined as the degree to which a legal rule achieves its objective and induces changes in behaviour that enhances the rule’s goal.<sup>220</sup> Studies in relation to ‘effectiveness’ or ‘impact’ evaluate whether the goals of (those who drafted) the

*International Relations*, Sage, 2012, p. 539; E.B. Weiss and H.K. Jacobson, *Engaging Countries: Strengthening Compliance with International Environmental Accords*, MIT Press, 2000, p. 4; O. Young, *Compliance and Public Authority: A Theory with International Applications*, Johns Hopkins University Press, 1979, p. 104; R.B. Mitchell, *Intentional Oil Pollution at Sea: Environmental Policy and Treaty Compliance*, MIT Press, 1994, p. 30; W.C. Bradford, *In the Minds of Men: A Theory of Compliance with the Laws of War*, *Arizona State Law Journal*, Volume 37, 2005, p. 1243; S. Cardenas, *Conflict and Compliance: State Responses to International Human Rights Pressure*, University of Pennsylvania Press, 2007, p. 7.

<sup>216</sup> T. Risse and K. Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance*, Cambridge University Press, 2013, p. 10.

<sup>217</sup> C. Romano et al., *The Oxford Handbook of International Adjudication*, Oxford University Press, 2014, p. 438.

<sup>218</sup> A. Kent, *China, the United Nations, and Human Rights: The Limits of Compliance*, University of Pennsylvania Press, 2011, p. 7.

<sup>219</sup> K. Raustiala and A. Slaughter, *International Law, International Relations and Compliance*, in: W. Carlsnaes et al., *Handbook of International Relations*, Sage, 2012, p. 539.

<sup>220</sup> *Ibid.*

legal rules are being fulfilled. Effective legal rules are rules that lead to observable, desired behavioural change.<sup>221</sup> Although the line between ‘compliance’ and ‘effectiveness’ can blur, the main difference between the two concepts is the establishment of causal relationships. Law and compliance are conceptually linked, because “law explicitly aims to produce compliance with its rules: legal rules set the standard by which compliance is gauged.”<sup>222</sup> However, the concept of compliance does not necessarily entail a cause-effect relationship between the legal rule and behaviour (which is an instant different with effectiveness).<sup>223</sup> As Raustiala and Slaughter explained, compliance is “agnostic about causality.”<sup>224</sup> Compliance draws no causal linkage between a legal rule and behaviour, but simply identifies conformity between the legal human rights framework and behaviour of a State.<sup>225</sup> Therefore, measuring and explaining compliance is a different exercise from establishing a causal link between the legal rule and compliance. The observation that a given State is in compliance (or not in compliance) with the human rights framework does not mean that this State is in compliance with this framework *as a result of* ratification of human rights treaties and the existence of the human rights framework. It is very complex to determine whether a State is in compliance (or not) due to the human rights framework itself, or because of a range of other factors instead.<sup>226</sup> In light of this, Cardenas argues rightly: “Even if compliance stems from factors other than legal norms, it still constitutes compliance, if for no other reason than the fact that outsiders will label it as such.”<sup>227</sup> The aim of this study is to gain an understanding to what extent Senegal is in compliance (or not in compliance) with the human rights framework in relation to the practice of FGM/C, and which factors explain the level of compliance (or non-compliance), but not necessarily to establish causal relationships. Consequently, this study does not explore why FGM/C continues to exist and how FGM/C can or should be ended. This study will neither assess the different approaches<sup>228</sup> nor reach conclusions about which strategy may be most effective to eliminate FGM/C.<sup>229</sup>

<sup>221</sup> K. Raustiala, Compliance & Effectiveness in International Regulatory Cooperation, *Case Western Reserve Journal of International Law*, Volume 32, 2000, p. 394.

<sup>222</sup> K. Raustiala and A. Slaughter, International Law, International Relations and Compliance, in: W. Carlsnaes et al., *Handbook of International Relations*, Sage, 2012, p. 538.

<sup>223</sup> When speaking of effectiveness is to speak directly of causality: when claiming that a legal rule is effective, is to claim that it led to certain behaviours or outcomes, see K. Raustiala, Compliance & Effectiveness in International Regulatory Cooperation, *Case Western Reserve Journal of International Law*, Volume 32, 2000, p. 398.

<sup>224</sup> *Ibid.*

<sup>225</sup> K. Raustiala, Compliance & Effectiveness in International Regulatory Cooperation, *Case Western Reserve Journal of International Law*, Volume 32, 2000, p. 398; C. Romano et al., *The Oxford Handbook of International Adjudication*, Oxford University Press, 2014, p. 438.

<sup>226</sup> O.A. Hathaway, Do Human Rights Treaties Make a Difference?, *Yale Law Journal*, Volume 112, 2002, p. 1989.

<sup>227</sup> S. Cardenas, *Conflict and Compliance: State Responses to International Human Rights Pressure*, University of Pennsylvania Press, 2007, p. 32.

<sup>228</sup> Such as, among others, the alternative rite of passage approach, the social norm approach, the grandmothers project/approach, the alternative source of income approach, safe houses approach.

<sup>229</sup> This will however be the goal of the international research project launched in March 2015. This five-year project, funded by the U.K. Department for International Development and led by the



### 8.2 Human rights framework

The sources of international law are enumerated in Article 38(1) of the Statute of the International Court of Justice.<sup>230</sup> The three 'primary' sources of international law are: (a) international conventions; (b) international custom; and (c) general principles of law. Human rights treaties fall under category (a) of Article 38 Statute ICJ. However, the 'human rights framework' consists not only of international human rights laws *strictu sensu*, but must be understood broadly and includes both hard law instruments (i.e. legally binding covenants, charters, treaties, protocols and conventions) and soft law documents (i.e. non-binding declarations, resolutions, general recommendations, consensus documents, guidelines, statements of intent, memoranda of understanding and principles).<sup>231</sup> The 'human rights framework on FGM/C' indicates the set of international and regional human rights instruments and documents dedicated to FGM/C, including monitoring mechanisms and remedies.

### 8.3 Female Genital Mutilation/Cutting

International consensus has not been reached about the terminology used to refer to the practice. Opposing views dominated (and still dominate) debates on what terms should be used. Attention to language is vital to understand the political and ideological debates surrounding the practice.<sup>232</sup> As Abusharaf argued: "Any meaningful discussion dealing with the question of female circumcision should heed the importance of terminology."<sup>233</sup>

The terminology to refer to the practice has undergone a number of important evolutions. In the early 1970s, when the practice first came to be known beyond the practicing communities and emerged as a topic of scholarship, it was commonly referred to as 'female circumcision'. Anthropologists, ethnographers and sociologists initially used this term in their work, given that in some societies the rituals surrounding both male and female circumcision form a part of the process of initiation into adulthood.<sup>234</sup> In addition, the term 'female circumcision' is often the English translation of the practice from local languages into English.<sup>235</sup>

A shift of language occurred in the late 1970s and early 1980s with increased feminist scholarship. These authors objected to the use of the term 'female circumcision', since it mistakenly suggests that the practice is analogous to male circumcision. This direct parallel would be wrong both from anatomical,

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New York-based Population Council is led by a consortium comprising of Bettina Shell-Duncan, Gerry Mackie and several African organizations.

<sup>230</sup> United Nations, *Statute of the International Court of Justice*, 18 April 1946.

<sup>231</sup> A. Boyle and C. Chinkin, *The Making of International Law*, Oxford University Press, 2007, p. 210-229.

<sup>232</sup> R.M. Abusharaf, *Female Circumcision: Multicultural Perspectives*, Pennsylvania Studies in Human Rights, University of Pennsylvania Press, 2013, p 5.

<sup>233</sup> *Ibid.*

<sup>234</sup> United Nation Children's Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 6.

<sup>235</sup> O. Bjälkander et al., *Female Genital Mutilation in Sierra Leone: Forms, Reliability of Reported Status, and Accuracy of Related Demographic and Health Survey Questions*, *Obstetrics and Gynecology International*, Volume 2013, Article ID 680926, 2013, p. 1.

religious and social viewpoints.<sup>236</sup> They regarded FGM/C as an example of patriarchal oppression, deep-rooted gender inequality that assigns women an inferior position in society and a form of violence against women. They argued that the term 'female circumcision' obscured the severity of the practice, which is not equivalent to "the simple foreskin removal involved in male circumcision."<sup>237</sup>

To emphasize the different nature of the practice compared to male circumcision and to establish a clear linguistic distinction, feminists, women's health advocates and human rights activists claimed that 'female genital mutilation' or 'FGM' would be the most appropriate term. This term gained growing support, since the word 'mutilation' emphasizes the gravity and physical damage of the practice. El Hadi argued: "It is a mutilation from the human rights and legal points of view because it is carried out with the intention of limiting and controlling women's sexuality and in perpetuating the subordination of women, denying them the full citizenship they deserve."<sup>238</sup> In 1990, the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children<sup>239</sup> adopted the term 'female genital mutilation'<sup>240</sup> at a meeting in Addis Ababa, Ethiopia and in 1991, the WHO recommended that the UN adopt this term as well.<sup>241</sup> The Technical Working Group of the WHO decided in 1995 that the adoption of 'female genital mutilation' or 'FGM' as a standard term was essential in terms of research, training, planning policies and formulating appropriate legislation.<sup>242</sup> Since then, the practice has come to be widely known as 'female genital mutilation'.

A second shift of language occurred in the late 1990s, moving away from the term 'female genital mutilation' in favour of a more value neutral term that is sensitive to local beliefs, namely 'female genital cutting' or 'FGC'. The preference for this term was partly due to dissatisfaction with the negative tone and association attached with 'mutilation'.<sup>243</sup> It was thought that the term 'mutilation' entails judgment, condemnation and insensitivity, especially towards girls and women who have undergone the procedure. In addition, some evidence showed that the use of the word 'mutilation' was alienating practicing communities and eventually hindering the process of social change for the elimination of the practice.<sup>244</sup> However, opponents argue that the term

<sup>236</sup> O. Bjälkander et al., Female Genital Mutilation in Sierra Leone: Forms, Reliability of Reported Status, and Accuracy of Related Demographic and Health Survey Questions, *Obstetrics and Gynecology International*, Volume 2013, Article ID 680926, 2013, p. 1.

<sup>237</sup> E. Eliah, REACHing for a Healthier Future', UNFPA, *Populi*, Volume 23, No. 1, March 1996, p. 15.

<sup>238</sup> A.A. El Hadi, *Female Genital Mutilation in Egypt*, in: M. Turshen, *African Women's Health*, Africa World Press, 2000, p. 146.

<sup>239</sup> See Chapter IV section 4.7 of this research for more information about the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children.

<sup>240</sup> United Nation Children's Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 7.

<sup>241</sup> World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008, p. 22.

<sup>242</sup> World Health Organization, *Female Genital Mutilation: Report of a WHO Technical Working Group*, Geneva, 17-19 July 1995, WHO/FRH/WHO/96.10, p. 4.

<sup>243</sup> World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008, p. 22.

<sup>244</sup> *Ibid.*

FGC does not reflect the accurate extent of injury on the genitalia caused by the practice.

Another development in the debate on the terminology of the practice is the use of the term 'female genital surgery' or 'FGS'. Although not often used, this more neutral expression takes into account the increased 'medicalisation' of the practice.<sup>245</sup>

From the 1950s till the 1990s, the UN used several terms to refer to the practice, including 'ritual operations',<sup>246</sup> 'ritual practices' and 'operations based on custom'. In the 1990s, the UN referred to the practice as 'female circumcision',<sup>247</sup> but in later UN documents the practice is usually referred to as 'female genital mutilation' or 'female genital mutilation/cutting'. However, there is up to today no consensus between UN agencies about the terminology to refer to the practice. The WHO and UNFPA<sup>248</sup> use the term 'female genital mutilation', while UNICEF uses the term 'female genital mutilation/cutting'. According to the WHO, the use of the word 'female genital mutilation' reinforces "the fact that the practice is a violation of girls' and women's rights, and thereby helps to promote national and international advocacy for its abandonment."<sup>249</sup> UNFPA claims: "More than ever, we are at a time when the practice must be viewed from a human rights perspective and the term 'mutilation' better describes the practice from this viewpoint both in terms of the process and the outcome."<sup>250</sup> However, UNICEF added the word 'cutting', because of "the importance of employing respectful terminology when working with practicing communities."<sup>251</sup>

In this research, the term 'female genital mutilation/cutting' or 'FGM/C' will be applied, emphasizing that the practice is a violation of human rights, but at the same time recognizing the importance of using less judgmental terminology. Other terminology may appear in quotations.

<sup>245</sup> See also Chapter III, section 7.2.2 of this research.

<sup>246</sup> World Health Organization, *Resolution 680 B II (XXVI) of the Economic and Social Council: Ritual Operations*, Eighteenth and Twentieth Meetings, EB23.R75, 2 and 3 February 1959 available at [http://apps.who.int/iris/bitstream/10665/87417/1/EB23R75\\_eng.pdf?ua=1](http://apps.who.int/iris/bitstream/10665/87417/1/EB23R75_eng.pdf?ua=1) [Last Accessed 1 October 2015].

<sup>247</sup> For example United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 14: Female Circumcision*, A/45/38, 1990; S. Detrick et al., *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"*, Martinus Nijhoff Publishers, 1992, p. 352.

<sup>248</sup> Since 2007 UNFPA has been using the term 'Female Genital Mutilation/Cutting', but revisited its position and formally adopted the term 'Female Genital Mutilation' in 2014. See also: United Nations Population Fund, *Implementation of the International and Regional Human Rights Framework for the Elimination of Female Genital Mutilation*, UNFPA New York, November 2014, p. 12.

<sup>249</sup> World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008, p. 22.

<sup>250</sup> United Nations Population Fund, *Implementation of the International and Regional Human Rights Framework for the Elimination of Female Genital Mutilation*, UNFPA, New York, November 2014, p. 12.

<sup>251</sup> United Nation Children's Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 7.

## 9 STRUCTURE OF THE BOOK

This research is structured in four parts, namely (I) theoretical framework; (II) human rights framework; (III) empirical analysis; and (IV) conclusions. Chapter II is a theoretical analysis of the different factors that explain compliance and non-compliance with international law in general and the human rights framework in particular. Both IL and IR theories will be examined and their explanations when and why States comply will be taken into account. Chapter III will provide more background information on the practice of FGM/C. It is necessary to explain in depth what the practice of FGM/C exactly entails, in order to be able to link the phenomenon to the different human rights that are being violated and the applicable human rights framework. Chapter IV is a legal analysis of the human rights (instruments and documents) that are being violated with the practice of FGM/C. In addition, this chapter will analyze the obligations and recommendations for States prescribed by the human rights framework in relation to elimination of FGM/C. In the empirical analysis of Chapter V, a case study in Senegal evaluates to what extent Senegal is in compliance with the human rights framework in relation to the practice of FGM/C. In addition, the factors that explain compliance and non-compliance with the human rights framework in relation to the practice of FGM/C in Senegal will be addressed. In Chapter VI, an answer to the central question of this research will be formulated.



# **PART I**

## **THEORETICAL FRAMEWORK**



## CHAPTER II

# THEORIES OF STATE COMPLIANCE WITH INTERNATIONAL LAW

*“It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”*

Louis Henkin, 1979<sup>1</sup>

### 1 INTRODUCTION

When and why – or under what conditions – do States comply with international law? Since the 1950s, legal theorists and political scientists have had extensive debates on the importance of international law in shaping State behaviour. In the 1960s and 1970s, parallel with the development and growth of international human rights law and changes in world politics, International Law (IL) and International Relations (IR) scholars started to develop theories on the question why States comply with (or violate) international law. Both IL and IR scholars described in their theories whether international law “mattered”, and if so, how, and under what conditions. They provided accounts of why States (do not) comply with international law, resulting in (sometimes) competing theories, approaches and perspectives. This chapter will address, by means of a literature review, the factors that follow from IL and IR theories that explain compliance and non-compliance with international law in general and the human rights framework in particular.

The structure of this chapter is as follows. It starts with the research question (section 2) and methodology (section 3) applied for this literature review. Section 4 will discuss the traditional IL theories and section 5 will examine the traditional IR theories. An analysis of more recent theories of IL and IR can be found in section 6. Concluding observations are spelled out in section 7.

### 2 RESEARCH QUESTION

The research question that will be addressed in this chapter is the following: *“Which factors follow from international law and international relations theories that explain compliance and non-compliance with international law in general and the human rights framework in particular?”*

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<sup>1</sup> L. Henkin, *How Nations Behave: Law and Foreign Policy*, New York, Columbia University Press, 2<sup>nd</sup> edition, 1979, p. 47.



### 3 METHODOLOGY

#### 3.1 Literature review

In order to provide an answer to this research question, a literature review was conducted. The aim of this literature review was not simply to summarize “all there is to know” about compliance with international law. This review neither intended to offer a comprehensive intellectual history of all the IL and IR theories nor to offer a comprehensive description of all theories present in both IL and IR scholarship. The overall aim of this literature review was to provide an overview of the factors that follow from IL and IR theories that explain compliance and non-compliance with international law in general and the human rights framework in particular.

#### 3.2 Literature search strategy

The first step of this literature review was a thorough search of relevant literature. Relevant publications in relation to compliance with international law (including journal articles, book chapters, working papers, conference proceedings, informal publications and other published reports) were identified. The main guiding point while searching the literature was the research question. The following search terms were used during the search: ‘compliance’, ‘comply’, ‘compl\*’, ‘theory’, ‘theories’, ‘international law’, ‘international’, ‘IL’, ‘international relations’, ‘IR’, ‘political science’, ‘human rights’, ‘rights’, ‘human rights framework’, ‘human rights law’, ‘international human rights law’, ‘human rights norms’, ‘law’, ‘norms’, ‘research’, ‘studies’. To ensure that publications that use other words than ‘compliance’ were included, the terms ‘implement\*’, ‘enforcement’, ‘enforc\*’, ‘effectiveness’, ‘effective\*’, ‘impact’, ‘domestic impact’ and ‘national impact’ were used as well. Combinations of these search terms were entered into several electronic scholarly literature databases, including Worldcat, Heinonline, Westlaw, Jstore, Web of Science, Lexis and Sage Journals Online. In addition, the citation index SSRN was searched. In order to be as comprehensive as possible, a search on the web was conducted, using search engines (such as Google Scholar) to search for literature. In addition, Bradford’s *International Legal Compliance: An Annotated Bibliography*<sup>2</sup> was a useful resource during the literature search. Of those studies included in the analysis, retrieved studies were used to identify other relevant studies by taking into account articles, books and reports cited or discussed in other relevant studies. This so-called ‘snowballing effect’ was a helpful method.

#### 3.3 Inclusion and exclusion criteria

The second step of this literature review was to define the inclusion and exclusion criteria. I was fully aware of the fact that the selection of publications

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<sup>2</sup> W.C. Bradford, *International Legal Compliance: An Annotated Bibliography*, *North Carolina Journal of International Law and Commercial Regulation*, Volume 30, No. 2, 2004.

to be integrated in the review could have a considerable bearing on the factors to be found and the conclusions reached. Therefore, each publication that was selected for possible inclusion in this review was read carefully, to identify whether it meets the inclusion criteria, to ensure that it fits precisely within the field of research. The choice of publications to include and exclude was again guided by the research question.

In the field of compliance, there exists a so-called “information overload” exist because of the many theories on compliance with international law. Therefore, criteria for eligibility and relevance were carefully drawn, being the following. The publication should explain compliance (and non-compliance) with international law in general and the human rights framework in particular.<sup>3</sup> The ‘compliance question’ should be differentiated from the question why States commit to international law in the first place. Even though the decision of a State to commit to international law (or not) is related to the question of compliance, the subject matter of discussion is different in many ways.<sup>4</sup> Therefore, studies solely focusing on the question of commitment were excluded from this review. Theories from both IL and IR were included in the literature review. This literature review did not focus on a particular geographic area (European Union, United States, Asia, Africa, etc). The literature review included literature in the English language since the 1960s (because the first attempts to study compliance date from the 1960s). The literature search was conducted between October 2011 and September 2015.

### 3.4 Selection of literature

In the first place, the traditional “dominant strands” (or “leading schools”) of IL and IR compliance theory were included in this literature review. But what are the traditional “dominant strands” or “leading schools”? After careful analysis of relevant literature, I found that four IL theories and four IR theories are generally regarded as the “dominant strands” in IL and IR literature.<sup>5</sup> The

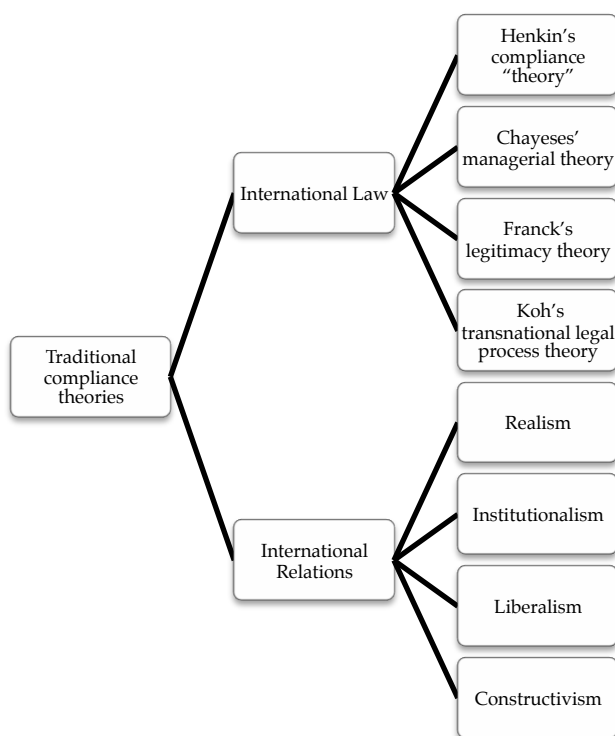
<sup>3</sup> A definition of ‘compliance’ can be found in Chapter I, section 8.1.

<sup>4</sup> M. Burgstaller, Amenities and Pitfalls of a Reputational Theory of Compliance with International Law, *Nordic Journal of International Law*, Volume 76, 2007, p. 43.

<sup>5</sup> Some authors divided the dominant strands a little bit differently. Guzman made, for example, a distinction between traditional legal theories (including the managerial model, legitimacy theory and transnational legal process) and international relations theories (including neorealists, liberal theory and institutionalist theory), see A.T. Guzman, A Compliance-Based Theory of International Law, *California Law Review*, Volume 90, 2002, p. 1830-1840. Bradford made a distinction between realism, enforcement theory, rational choice, institutionalism, liberalism and normativism, see W.C. Bradford, W.C., In the Minds of Men: A Theory of Compliance with the Laws of War, *Arizona State Law Journal*, Volume 37, 2005, p. 6. Abbott identified four IR theories, including realism, institutionalism, liberalism and constructivism, see K.W. Abbott, Toward a Richer Institutionalism for International Law and Policy, *Journal of International Law & International Relations*, Volume 8, 2005, p. 12-16. Arend identified three IR theories, including structural realism, rationalist institutionalism and constructivism, see A.C. Arend, Do Legal Rules Matter? International Law and International Politics, *Virginia Journal of International Law*, Volume 38, 1997/1998, p. 109-110; Hoder makes a distinction between the main theories of IL (including managerial theory, consent-based theory, theory of enforcement, legitimacy theory, transnational legal process theory and theories of rational choice) as well as the main theories of IR (including realism, liberalism, institutionalism and constructivism), see L. Hoder, *Is there a Theory of International Legal Compliance?*, Paper for the ECPR

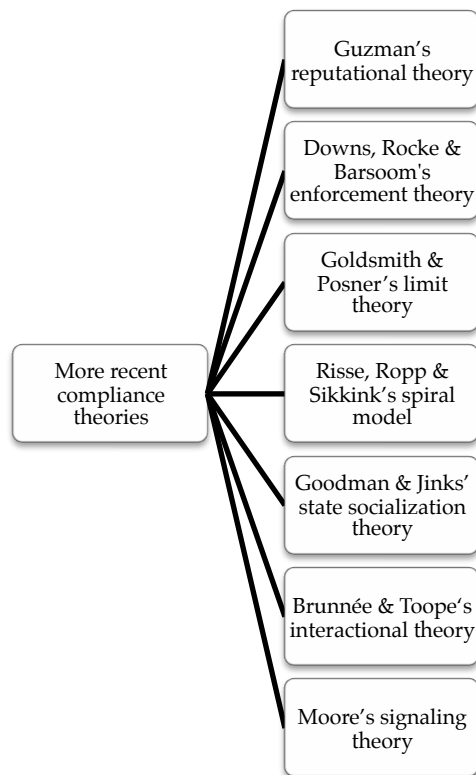
leading schools in IL theory are: (i) Henkin's compliance theory; (ii) Chayes and Chayes' managerial theory; (iii) Franck's legitimacy theory; and (iv) Koh's transnational legal process theory. These traditional IL theories are also referred to as the 'traditional', 'optimist' or the 'conventional' approach. The leading schools in IR theory are: (i) realism; (ii) institutionalism; (iii) liberalism; and (iv) constructivism. These eight "dominant strands" (see figure 2.1) within compliance theory were examined with the aim to identify the factors that these theories ascribe compliance or non-compliance with international law in general and the human rights framework in particular.

Figure 2.1 Traditional International Law and International Relations compliance theories



In the second place, I decided to also include in this literature review more recent compliance theories by both IL and IR scholars. The following seven “theories” were included (see figure 2.2), that are accepted in the current IL and IR literature as alternatives to the “dominant strands”: (i) Guzman’s reputational theory; (ii) Downs, Roque & Barsoom’s enforcement theory; (iii) Goldsmith & Posner’s limit theory; (iv) Risse, Ropp & Sikkink’s spiral model; (v) Goodman & Jinks’ State socialization theory; (vi) Brunnée & Toope’s interactional theory; and (vii) Moore’s signaling theory.

Figure 2.2 More recent compliance theories



The traditional “dominant strands” and new theories were analyzed with the aim to identify the factors that these theories use to explain compliance or non-compliance with international law. In case these theories specifically addressed compliance with the human rights framework, it was taken into account. In addition, it was analyzed how these new theories relate to the traditional IL and IR theories. I also examined whether these theories included new factors explaining compliance that did not follow from the traditional IL and IR theories.

## 4 INTERNATIONAL LAW THEORIES EXPLAINING COMPLIANCE

### 4.1. Henkin's compliance theory

Louis Henkin was one of the pioneers of the international legal process school and he sought to explore the actual impact of international law on the behaviour of States.<sup>6</sup> Henkin argued that States behave largely in compliance with international law. The international human rights regime is, according to Henkin, no exception. In 1968, he first published his famous book *How Nations Behave*.<sup>7</sup> He asserted: "It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."<sup>8</sup> Koh described these oft-quoted words as the "sentence that launched a thousand articles."<sup>9</sup> Henkin's work set the standard and remained a touchstone for scholars working in the field of compliance.<sup>10</sup> Henkin's ideas about the nature of international law have been at the heart of the discussion of IL and IR scholars.

#### 4.1.1 States comply with international law

Henkin claimed that States are law-abiding and that the international system is orderly. He started with the assumption that States comply with international law,<sup>11</sup> despite the lack of an executive authority with power to enforce international law and the lack of effective sanctions against the violator.<sup>12</sup> In fact, he argued, States act in the expectation that other States will comply with international law and treaty obligations. Based on that expectation, States maintain expensive national and international institutions and they put a lot of effort, energy and resources to conclude treaties, struggling over details, over a phrase or a word. Henkin's argument is that States would refrain from doing that, if they were not convinced that international law matters.<sup>13</sup> He argues that this is the case for the whole international legal framework: "If it were not so, the legal system would be a massive delusion."<sup>14</sup> He went so far as to argue that law might be even irrelevant, because States would act the same way in the absence of law.<sup>15</sup> He claimed that the existing laws are a codification of existing

<sup>6</sup> A. Slaughter, International Law in a World of Liberal States, *European Journal of International Law*, Volume 6, No. 1, 1995, p. 503.

<sup>7</sup> L. Henkin, *How Nations Behave: Law and Foreign Policy*, New York, Columbia University Press, 2<sup>nd</sup> edition, 1979.

<sup>8</sup> *Ibid*, p. 47.

<sup>9</sup> H.H. Koh, *Louis Henkin (1917-2010)*, *Opinio Juris*, 15 October 2010, available at

<http://opiniojuris.org/2010/10/15/louis-henkin-1917-2010/> [Last accessed 1 October 2015].

<sup>10</sup> K. Raustiala and A. Slaughter, *International Law, International Relations and Compliance*, in: W. Carlsnaes et al., *Handbook of International Relations*, London, Sage Publications, 2012, p. 540.

<sup>11</sup> L. Henkin, *How Nations Behave: Law and Foreign Policy*, New York, Columbia University Press, 1968, p. 49.

<sup>12</sup> *Ibid*, p. 45-49.

<sup>13</sup> L. Henkin, *International Law: Politics and Values*, Martinus Nijhoff Publishers, 1995, p. 47.

<sup>14</sup> *Ibid*.

<sup>15</sup> L. Henkin, *How Nations Behave: Law and Foreign Policy*, New York, Columbia University Press, 1968, p. 84-89.

mores, of how people and States (ought to) behave.<sup>16</sup> Henkin found it easy to demonstrate that States generally comply with international law. He argued that States comply with international law for the same reasons that citizens comply with national laws: "Citizens who join in making law, generally approve the law they have made, and have incentives to maintain it. The citizen has some sense of citizenship (if not of morality), which militates to compliance and engenders habits of compliance. [...] Violations are likely to be detected and violators are likely to be known; the victim is likely to react, the community likely to be offended and to join in an organized reaction."<sup>17</sup> Henkin argues that the international system acts in the same manner and that the international system has a culture of compliance.<sup>18</sup> In his book *How Nations Behave*,<sup>19</sup> Henkin identified a number of factors that influence compliance with international law positively and negatively. He divided these factors into two categories, namely foreign policy factors (or: "external inducements") and domestic factors (or: "internal motivations"). However, he acknowledged that it is not easy to separate domestic and foreign policy factors: "A nation's foreign policy is intimately related to national qualities and domestic factors such as those considered. It would not be easy to determine how much is due to national "character" and domestic influences, how much to foreign policy and the elements that contribute to it."<sup>20</sup>

#### 4.1.2 Foreign policy factors

Henkin argued that States comply with international law, because they have an interest to do so. States comply with international law, to keep the international system intact: "States have an interest in keeping the society running and keeping international relations orderly."<sup>21</sup> Henkin argued that States comply with international law, because they desire their relations with other countries to be orderly and friendly.<sup>22</sup> States do not like to be accused or criticized by other States and violations between two States will negatively influence their relations. According to Henkin, considerations regarding "honour," "prestige," "leadership," "influence," "stability," "reliability" and "reputation" often weighs in favour of international law compliance. States desire a reputation for principled behaviour, for propriety and respectability.<sup>23</sup> Henkin further argued that the States that developed international law (e.g. Western European States) are more satisfied with the international legal framework and are more likely to comply with it: "Since law is generally a conservative force, it is more likely to be observed by those more content with their lot."<sup>24</sup> According to Henkin,

<sup>16</sup> Henkin argues: "If there were no law against homicide, most individuals in contemporary societies would still refrain from murder." See L. Henkin, *How Nations Behave: Law and Foreign Policy*, New York, Columbia University Press, 1968, p. 89.

<sup>17</sup> L. Henkin, *International Law: Politics and Values*, Martinus Nijhoff Publishers, 1995, p. 48-49.

<sup>18</sup> *Ibid.*, p. 49.

<sup>19</sup> L. Henkin, *How Nations Behave: Law and Foreign Policy*, New York, Columbia University Press, 2<sup>nd</sup> edition, 1979.

<sup>20</sup> *Ibid.*, p. 68.

<sup>21</sup> *Ibid.*, p. 51.

<sup>22</sup> *Ibid.*, p. 52.

<sup>23</sup> *Ibid.*, p. 52.

<sup>24</sup> *Ibid.*, p. 53.

Western-style democracies have tended to comply more with international law than others, since the Western European powers (and their colonial offspring) created international law in their image and their interest.<sup>25</sup> Quite related to that, Henkin noted that compliance with international law is dependent on the attitude of States towards international law. Some States comply more with international law, because of their national “morality” and “character”.<sup>26</sup> They are – according to Henkin – sensitive to stigma of violating international law.

#### 4.1.3 Domestic factors

Henkin mentions psychological reasons as an internal force (e.g. domestic factor) that influences compliance positively. According to Henkin, the quality of law implies an obligation. Therefore, States comply with international law “from habit and imitation of others.”<sup>27</sup> In addition, States have moral commitments, reflecting the ideology, the values, the “style” of their society as well as some awareness of, and respect for, world opinion.<sup>28</sup> Another domestic factor is the acceptance of the law into national life and institutions. Henkin argued that when international law is accepted, “national law will reflect it, the institutions and personnel of government will take account of it, and the life of the people will absorb it.”<sup>29</sup> In other words: with acceptance of the law comes automatically compliance. In addition, national constitutions and institutions contribute to compliance with international law. In most States, international law is part of the national laws, without need for legislative or executive intervention. According to Henkin, treaties are law of the land and (if self-executing) will be enforced by the courts on their own initiative. Institutions make compliance normal and routine.<sup>30</sup> Henkin also noted that political personalities (and their personal power and tenure) of politicians, lawyers, law officers (particularly the legal advisor to a foreign office), political officers and policy-makers, may be an important influence for compliance with international law and the degree of their commitment to international order.<sup>31</sup> Special commitment to a rule or agreement, makes it less likely that the State would breach it during that official’s term or while he or she continues in power. President Kennedy’s commitment to the Nuclear Test-Ban Treaty is given as an example. Henkin argued that the likelihood of compliance with important international agreements can purposefully be enhanced by requiring heads of State personally to commit their prestige to the agreement.<sup>32</sup>

<sup>25</sup> L. Henkin, *How Nations Behave: Law and Foreign Policy*, New York, Columbia University Press, 2<sup>nd</sup> edition, 1979, p. 63.

<sup>26</sup> *Ibid*, p. 61.

<sup>27</sup> *Ibid*, p. 60.

<sup>28</sup> L. Henkin, *International Law: Politics and Values*, Martinus Nijhoff Publishers, Developments in International Law, Volume 18, 1995, p. 49.

<sup>29</sup> L. Henkin, *How Nations Behave: Law and Foreign Policy*, New York, Columbia University Press, 2<sup>nd</sup> edition, 1979, p. 60.

<sup>30</sup> L. Henkin, *International Law: Politics and Values*, Martinus Nijhoff Publishers, Developments in International Law, Volume 18, 1995, p. 49.

<sup>31</sup> L. Henkin, *How Nations Behave: Law and Foreign Policy*, New York, Columbia University Press, 2<sup>nd</sup> edition, 1979, p. 64-66.

<sup>32</sup> *Ibid*, p. 65.

#### 4.1.4 Factors explaining non-compliance

Nevertheless, Henkin also acknowledged that there are “occasional” instances where States are not in compliance with international law. Henkin argued that sometimes a violation occurs not as a matter of State policy, but “by mistake, or by an unauthorized act of an institution or official of the State, or in a burst of national passion or other irrationality.”<sup>33</sup> These violations are classified by Henkin as “irrational” instances of non-compliance with international law. Nevertheless, Henkin acknowledged that there are also “rational” exceptions of non-compliance with international law, for example when an international agreement that was once desirable has ceased to be satisfactory.<sup>34</sup> Henkin also argued that States sometimes deliberately violate international law, because they expect that the short-term advantages of violation will outweigh its costs (especially its long-term costs): “There are cases when the cost of law observance seems too high, the cost of violation temptingly low.”<sup>35</sup> Another reason why States deliberately not comply with international law is that “obligations are sometimes accepted without authentic commitment (as may be true for some States in respect of human rights).”<sup>36</sup> Sometimes there is a tension between international treaties and the habits and traditions of State autonomy. Henkin argued that some States have the feeling that what they do to their citizens is not the business of other States or of international law. Considerations regarding honor, duty, leadership, power, forcefulness and prestige are, according to Henkin, also important. In addition, Henkin mentioned domestic influences for violation of international law: “There are domestic forces and impulses that might make a nation violate the law.”<sup>37</sup> In the first place, Henkin claimed that, as there are psychological inducements to compliance with international law, there might also be countervailing psychological pressures to violate international law. The sovereignty of a State may give the State a sense of freedom and power to behave as it likes, regardless of the law.<sup>38</sup> In the second place, pressure of influential parties (such as “opposition parties, impeding elections, a hostile press, pressure groups, organized and vocal segments of public opinion”) might be a force for violation of international law.<sup>39</sup> In the third place, national institutions can also hinder State-compliance with international law. Henkin argued that international law is sometimes violated when the governmental machinery is inadequate, when administration is ineffective, when departments responsible for carrying out undertakings are remiss in doing so. In the fourth place, States might violate

<sup>33</sup> L. Henkin, *International Law: Politics and Values*, Martinus Nijhoff Publishers, Developments in International Law, Volume 18, 1995, p. 47.

<sup>34</sup> *Ibid.*

<sup>35</sup> L. Henkin, *How Nations Behave: Law and Foreign Policy*, New York, Columbia University Press, 2<sup>nd</sup> edition, 1979, p. 69; and L. Henkin, *International Law: Politics and Values*, Martinus Nijhoff Publishers, Developments in International Law, Volume 18, 1995, p. 47-48.

<sup>36</sup> L. Henkin, *International Law: Politics and Values*, Martinus Nijhoff Publishers, Developments in International Law, Volume 18, 1995, p. 48.

<sup>37</sup> L. Henkin, *How Nations Behave: Law and Foreign Policy*, New York, Columbia University Press, 2<sup>nd</sup> edition, 1979, p. 74.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*



international law due to inadequate legal advice.<sup>40</sup> In addition, Henkin referred to additional factors why international treaties are being violated. He explained that international norms are sometimes outdated “an old treaty, though still technically in effect, may be outmoded; treaties of long duration, also, may no longer be reasonable or fair.”<sup>41</sup> Quite remarkably, Henkin also put another factor forward, being the lack of sufficient deterrence. He wrote that if the only response to violation of a treaty is termination of that specific clause or article, the State might not be likely to be deterred from violating that provision.<sup>42</sup>

Henkin wrote more specific about human rights and compliance in his essay *Inter-State Responsibility for Compliance with Human Rights Obligations*<sup>43</sup> and he argued: “It is time for States parties to multilateral human rights treaties to recognize and to act on their responsibility, and for all States to recognize their mutual responsibility for compliance with international human rights norms generally.” In his view, the extent that ordinary human beings in the world will enjoy human rights depends on maintaining what he called “a human rights culture” around the world, which depends in turn on the commitment and responsibility of governments, institutions, peoples, NGOs and individuals: “It depends on all of us.”<sup>44</sup>

#### 4.1.5 Concluding observations

When describing and explaining all the factors that influence compliance with international law positively and/or negatively, Henkin used many examples of compliance with and violations of international law. Henkin mostly focused on compliance with international law in general and only briefly touched upon the question of compliance with the international human rights framework. His list of factors explaining compliance and non-compliance is very rich and his analysis offers a quite chaotic analysis of relevant factors. Raustriala and Slaughter argue that his list of factors is “too rich, however, to yield a clear theory of why and when States do and do not comply.”<sup>45</sup> Overall, Henkin was of the opinion that critics solely focus on the rare cases of non-compliance, rather than the overwhelming cases of compliance. To conclude, Henkin offered a strong argument of compliance and claimed: “the fact is that law observance, not violation, is the common way of nations.”<sup>46</sup>

## 4.2 Chayes & Chayes’ managerial theory

The managerial theory of international legal compliance of Chayes & Chayes

<sup>40</sup> L. Henkin, *How Nations Behave: Law and Foreign Policy*, New York, Columbia University Press, 2<sup>nd</sup> edition, 1979, p. 76.

<sup>41</sup> *Ibid*, p. 76-77.

<sup>42</sup> *Ibid*, p. 77.

<sup>43</sup> L. Henkin, *Inter-State Responsibility for Compliance with Human Rights Obligations*, in: L.C. Cohrah et al., *Men’s Inhumanity to Man, Essays on International Law in Honour of Antonia Cassese*, Kluwer Law International, International Humanitarian Law Series, Volume 5, 2003, p. 383-397.

<sup>44</sup> *Ibid*, p. 397.

<sup>45</sup> K. Raustriala and A. Slaughter, ‘International Law, International Relations and Compliance’, in: W. Carlsnaes et al., *Handbook of International Relations*, London, Sage Publications, 2012, p. 540.

<sup>46</sup> L. Henkin, *How Nations Behave: Law and Foreign Policy*, New York, Columbia University Press, 1968, p. 46.

has the same premise as Henkin, in particular the expectation that States have a “general propensity to comply with their international treaty obligations.”<sup>47</sup> Chayes & Chayes presented in their book *The New Sovereignty: Compliance with International Regulatory Agreements*<sup>48</sup> an alternative traditional legal process theory of compliance, namely the “managerial model.” This model rejects enforcement approaches to international law compliance where compliance is achieved through coercive mechanisms (such as economic or military sanctions). Chayes & Chayes are not in favour of coercive measures, because they argue that these measures are too costly, too political and often ineffective in changing behaviour.<sup>49</sup> Instead, the managerial model is relying primarily on a cooperative, problem-solving approach.<sup>50</sup> This model places the spotlight on the process of international dialogue.<sup>51</sup> Chayes & Chayes claim that the fundamental instrument for maintaining compliance with treaties is “an iterative process of discourse among the parties, the treaty organization, and the wider public.”<sup>52</sup> In order to support their claim, they identified three factors that contribute to compliance with international law, being: efficiency, interests and norms. They did not suggest that these three factors (separately or in combination) will lead to compliance in every case or even in any particular instance.<sup>53</sup> However, they claimed that these three factors “lend plausibility to the assumption of a propensity to comply”<sup>54</sup> and will lead to a better understanding of the problems of non-compliance and how they can be addressed.<sup>55</sup>

#### 4.2.1 Efficiency

In the first place, Chayes & Chayes argued that compliance is efficient from an internal, decisional perspective. They explained that “decisions are not a free good”<sup>56</sup> and that “governmental resources for policy analysis and decision

<sup>47</sup> A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements*, Harvard University Press, 1995, p. 4.

<sup>48</sup> Ibid. Part of this book had previously been published: A. Chayes and A.H. Chayes, On Compliance, *International Organization*, Volume 47, No. 2, 1993.

<sup>49</sup> A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements*, Harvard University Press, 1995, p. 2-3 and O.A. Hathaway, Do Human Rights Treaties Make a Difference? *Yale Law Journal*, Volume 112, 2002, p. 1935. Chayes and Chayes might have been inspired by M.B. Akehurst, *A Modern Introduction to International Law*, Bookbarn International, 1993, p. 7. Akehurst noted: “Sanctions are not the main reason why the law is obeyed in any legal system. People do not refrain from committing murder because they are afraid of being punished, but because they have been brought up to regard murder as unthinkable; habit, conscience, morality, affection and tolerance play a far more important part than sanctions. Sanctions are effective only if the law-breaker is in a small minority; if he is not, sanctions are powerless to secure compliance with the law, as is shown by wide-spread violation of speed limits...”

<sup>50</sup> A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements*, Harvard University Press, 1995, p. 3.

<sup>51</sup> O.A. Hathaway, Do Human Rights Treaties Make a Difference? *Yale Law Journal*, Volume 112, 2002, p. 1955.

<sup>52</sup> A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements*, Harvard University Press, 1995, p. 25.

<sup>53</sup> Ibid, p. 3-4.

<sup>54</sup> Ibid, p. 4.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

making are costly and in short supply.”<sup>57</sup> They argued that the continuous recalculation of costs and benefits is not necessary if circumstances have not changed since the original decision. Therefore, States that comply with international law save transaction costs, because compliance avoids the need to recalculate the costs and benefits of a decision.<sup>58</sup> The adoption of a treaty establishes an authoritative rule system.<sup>59</sup> Chayes & Chayes argued that the alternative to recalculation is to follow the established treaty rule.

#### 4.2.2 National interest

In the second place, Chayes & Chayes noted that a treaty is a consensual instrument: “It has no force unless the State has agreed to it.”<sup>60</sup> They argued that the process by which international agreements are formulated and concluded “is designed to ensure that the final result will present, to some degree, an accommodation of the interests of the negotiating States.”<sup>61</sup> According to Chayes & Chayes, the international treaty-making process leaves enough room for accommodating divergent interests. They acknowledge that, from the point of view of the particular interests of any State, the outcome of the treaty-making process might fall short and States will probably not be able to achieve all of its objectives. They recognize the fact that a treaty is necessarily a compromise between States.<sup>62</sup> Nevertheless, Chayes & Chayes argue that if the treaty or international agreement is well designed, compliance problems and enforcement issues are likely to be manageable. If non-compliance occurs, it is – according to Chayes & Chayes – no willful disobedience of States, but rather an unsuccessful negotiating process that did not incorporate a broad enough range of the States’ interests.<sup>63</sup> Overall, they assumed that international treaties are consent-based instruments that serve the interest of the participating States.<sup>64</sup>

#### 4.2.3 Norms

In the third place, Chayes & Chayes compare the acceptance of people to obey the national laws with the acceptance of States to obey international law. They argue: “the existence of legal obligation, for most actors in most situations, translates into a presumption of compliance, in the absence of strong countervailing circumstances.”<sup>65</sup> Henkin used the same kind of argumentation in his theory. Chayes & Chayes refer to the principle of *pacta sunt servanda*<sup>66</sup>

<sup>57</sup> A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements*, Harvard University Press, 1995, p. 4.

<sup>58</sup> Ibid, and A.T. Guzman, A Compliance-Based Theory of International Law, *California Law Review*, Volume 90, 2002, p. 1830.

<sup>59</sup> A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements*, Harvard University Press, 1995, p. 4.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid, p. 4-5.

<sup>62</sup> Ibid, p. 7.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid, p. 4-5 and A.T. Guzman, ‘A Compliance-Based Theory of International Law’, *California Law Review*, Volume 90, 2002, p. 1830.

<sup>65</sup> A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements*, Harvard University Press, 1995, p. 8.

<sup>66</sup> Ibid, p. 128.

(treaties are to be obeyed), the fundamental norm of international law that the State is bound by its consent. According to Chayes & Chayes, if a State has formally assented to a provision contained in international law, the State has a legal obligation to obey this provision and is “presumptively a guide to action.”<sup>67</sup> In other words, States comply with international law, because of their prior agreement to do so, even in the absence of a threat of reprisal.<sup>68</sup> With the agreement, States created a normative obligation for themselves that they cannot ignore. However, Chayes & Chayes also acknowledge that the mere existence of international law does not ensure automatic compliance by State Parties that have assented to it. It is necessary that the norms of the treaty have to be understood and accepted in their application to concrete situations for States to have the power to induce obedience.<sup>69</sup>

#### 4.2.4 Factors explaining non-compliance

Chayes & Chayes argued that the decision of a State whether or not to comply with a treaty is (in most cases)<sup>70</sup> not the result of a calculation of costs and benefits. To their minds, States only infrequently violate international law wilfully: “such cases are the exception rather than the rule.”<sup>71</sup> But if States do not violate international law premeditated and deliberately, why do States violate their international legal obligations? What explains this violating behavior of States? Chayes & Chayes identified three factors that in their view often lie at the root of non-compliance with international law: (1) ambiguity and indeterminacy of treaty language, (2) limitations on the capacity of parties to carry out their undertakings and (3) the temporal dimension of the social, economic, and political changes contemplated by regulatory treaties.

In the first place, Chayes & Chayes point out that the general language of treaty provisions very often do not provide determinate answers to specific questions. Drafters of international legal instruments often did not foresee many of the possible applications, neither their contextual settings. Therefore, language of international law is, according to Chayes & Chayes often “unable to capture meaning with precision.”<sup>72</sup> This can produce a “zone of ambiguity within which it is difficult to say with precision what is permitted and what forbidden.”<sup>73</sup> On the one hand, sometimes there are good reasons for choosing a more general formulation of the obligation (for example when the political

<sup>67</sup> A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements*, Harvard University Press, 1995, p. 128.

<sup>68</sup> *Ibid.*, p. 116.

<sup>69</sup> *Ibid.*, p. 112.

<sup>70</sup> However, there Chayes and Chayes acknowledge that in some instances states deliberately violate international law, or that states become a party to a treaty, without any intention of compliance. They note: “Clearly some of the most worrisome cases of noncompliance take that form: Iraq’s invasion of Kuwait, and North Korea’s refusal to permit International Atomic Energy Agency (IAEA) inspection in accordance with its obligation under the Nuclear Non-Proliferation Treaty (NPT), for example. On occasion a state may enter into a treaty to appease a domestic or international constituency, with little intention of carrying it out.” See A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements*, Harvard University Press, 1995, p. 9.

<sup>71</sup> *Ibid.*, p. 10.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*, p. 10-11.

consensus may not support more precision; or to try to inform a process, rather than seeking to foresee in detail the circumstances in which the words will be brought to bear). On the other hand, detailed language of treaty provisions has its difficulties as well: "It invites the maxim, *expressio unius est exclusio alterius* (to express one thing is to exclude the other)."<sup>74</sup> Sometimes precision provides loopholes, requiring a process of continuous revision. Overall, in many instances, Chayes & Chayes explain that States take advantage of the indeterminacy of treaty language to justify a (too) broadly interpretation of treaty provisions. In that way, many States seek to discover the limits of their treaty obligations. Another related problem of ambiguity is that States comply with the letter of the obligation, but they leave "questions about the spirit for another day."<sup>75</sup>

In the second place, Chayes & Chayes explain that, according to classical international law, treaties are agreements among States. Legal rights and obligations run between States and the object of the international agreement is to affect State behavior.<sup>76</sup> However, in many instances, the real object of a treaty is not to affect State behavior, but for example to regulate the activities of individuals and private entities. A State is often in compliance when it has formally enacted implementing legislation and when the State established and enforced a domestic regime designed to ensure compliance. However, in many States (mostly developing countries), deficits in domestic regulatory capacity exist, what makes States (sometimes) unwillingly violate their international law obligations. In those countries, apart from political will, there is a lack of scientific, technical, bureaucratic, and financial resources to build effective domestic enforcement systems. Chayes & Chayes substantiated their claim with providing the example of the Montreal Protocol.<sup>77</sup> Four years after the Protocol was signed, only half of the Member States had complied with the requirements of the treaty. However, the great majority of the violating States were developing countries that were simply unable to comply without technical assistance from the treaty organization.<sup>78</sup>

In the third place, Chayes & Chayes argue that regulatory treaties<sup>79</sup> manage a major international problem area over time. However, significant changes in social or economic systems with the means of treaties, take time. A period of transition is always necessary: "Treaty drafters often recognize at the negotiating stage that there will be a considerable time lag after the treaty is

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<sup>74</sup> See A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements*, Harvard University Press, 1995, p. 11.

<sup>75</sup> *Ibid.*, p. 13.

<sup>76</sup> *Ibid.*

<sup>77</sup> The Montreal Protocol (entered into force on 1 January 1987) is an international treaty designed to reduce the production and consumption of ozone depleting substances in order to reduce their abundance in the atmosphere, and thereby protect the ozone layer.

<sup>78</sup> A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements*, Harvard University Press, 1995, p. 14-15.

<sup>79</sup> *Ibid.*, p. 15. The major focus of the theory of Chayes and Chayes is on regulatory treaties. They do not deny that these type of treaties are their major concern. However, there are many other types of international treaties, but Chayes and Chayes do not provide explanations how compliance works in other situations. See also A.T. Guzman, A Compliance-Based Theory of International Law, *California Law Review*, Volume 90, 2002, p. 1831.

concluded before some or all of the parties can bring themselves into compliance.”<sup>80</sup> Therefore, modern treaties have provided for transitional arrangements. Chayes & Chayes emphasized that the problem of a time lag between undertaking and performance is even more prominent in the field of human rights: “Human rights norms, despite their almost universal acceptance, are slow to establish themselves in places where they may clash with local customs, culture, and systems of government.”<sup>81</sup> They contend that non-compliance with human rights treaties is very common and that there is a big time lag between undertaking and performance.<sup>82</sup> However, Chayes & Chayes argue that, although human rights treaties include ideals of the international system, it is a mistake to call human rights treaties “aspirational.” Instead, these treaties are – according to Chayes & Chayes – designed to initiate a process that over time (perhaps a long time) would bring behavior “into greater congruence with those ideals.”<sup>83</sup>

#### 4.2.5 Elements of management strategy

Chayes & Chayes further provide a management strategy to persuade non-complying States to act in accordance with international law. This strategy consists of three elements. The first and “almost universal element of management strategy”<sup>84</sup> is to increase transparency regarding the requirements of the treaty regime and the Member State’s performance under it.<sup>85</sup> Transparency influences strategic interaction among Member States of the treaty and will consequently lead to better compliance.<sup>86</sup> The second element is to improve the dispute settlement system. Where ambiguity in treaty language creates compliance problems, the traditional remedy is the dispute settlement machinery: binding adjudication or informal meditative processes. According to Chayes & Chayes, it does not matter whether the dispute settlement procedure is legally required or the decision is legally binding, so long as the outcome is treated as authoritative. They explain that a good-working dispute settlement system has a preventive or anticipatory value.<sup>87</sup> The third element is building capacity, because – as mentioned previously – the lack of technical and bureaucratic capability and financial resources is a factor that influences compliance negatively. Therefore, capacity building (or “technical assistance”) has a major function in enabling countries to comply with the requirements of a certain treaty.<sup>88</sup> These three elements are part of Chayes & Chayes’ management

<sup>80</sup> A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements*, Harvard University Press, 1995, p. 15.

<sup>81</sup> *Ibid.*, p. 16.

<sup>82</sup> E. Neumayer, Do International Human Rights Treaties Improve Respect for Human Rights?, *Journal of Conflict Resolution*, Volume 49, No. 6, 2005, p. 928-929.

<sup>83</sup> A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements*, Harvard University Press, 1995, p. 17.

<sup>84</sup> *Ibid.*, p. 22.

<sup>85</sup> O.A. Hathaway, Do Human Rights Treaties Make a Difference? *Yale Law Journal*, Volume 112, 2002, p. 1957.

<sup>86</sup> A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements*, Harvard University Press, 1995, p. 22 and p. 135-153.

<sup>87</sup> *Ibid.*, p. 24 and p. 201-225.

<sup>88</sup> *Ibid.*, p. 25.

strategy and “merge into a broader process of “jaw-boning” – the effort to persuade the miscreant to change its ways – that is the characteristic method by which international regimes seek to induce compliance.”<sup>89</sup>

#### 4.2.6 Concluding observations

Chayes & Chayes used in their managerial theory many examples of compliance with and violations of international law, often drawn from their own experiences as lawyers. Like Henkin, they argued that States generally comply with international law. Chayes & Chayes reject sanctions and other forms of enforcement and instead argue for a “cooperative, problem-solving approach” to promoting compliance.<sup>90</sup> Factors that contribute to compliance with international law are efficiency, national interests and norms. Three factors lie at the root of non-compliance, including: ambiguous treaty language, limited capacity and the temporal dimension.

### 4.3 Franck’s legitimacy theory

Franck presented in his article *Legitimacy in the International System*<sup>91</sup> and in his book *The Power of Legitimacy Among Nations*<sup>92</sup> an alternative legal theory of compliance that has come to be known as the legitimacy theory (also referred to as the “fairness model”). Franck started with the following claim: “Most States observe systematic rules much of the time in their relations with other States.”<sup>93</sup> This claim reminds us of the famous aphorism of Henkin. Like Henkin and Chayes & Chayes, Franck also believed that States generally comply with international law and is particularly interested in the question why sovereign States voluntarily comply with rules in the absence of a coercive authority, even against perceived self-interest.<sup>94</sup> He recognized that States do not always comply with all international treaties and noticed that some rules are harder to violate than others.<sup>95</sup> His aim is to determine why and under what circumstances international law is complied with, or – in Franck’s words – to find an answer to the question: “Why do powerful nations obey powerless rules?”<sup>96</sup>

#### 4.3.1 The “compliance pull”

Franck’s hypothetical answer to the above question is: “Because they [States] perceive the rule and its institutional penumbra to have a high degree of

<sup>89</sup> A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements*, Harvard University Press, 1995, p. 25.

<sup>90</sup> *Ibid*, p. 3.

<sup>91</sup> T.M. Franck, *Legitimacy in the International System*, *American Journal of International Law*, Volume 82, 1988.

<sup>92</sup> T.M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, 1990.

<sup>93</sup> T.M. Franck, *Legitimacy in the International System*, *American Journal of International Law*, Volume 82, 1988, p. 705.

<sup>94</sup> *Ibid*, p. 707.

<sup>95</sup> *Ibid*, p. 708; and T.M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, 1990, p. 24.

<sup>96</sup> *Ibid*, p. 3.

legitimacy.”<sup>97</sup> In other words, Franck argued that legitimacy is the driving force behind State compliance. He defined legitimacy as the quality of a rule “which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with the right process.”<sup>98</sup> According to Franck, “a right process” includes the notion of valid sources, but also encompasses linguistic, literary-structural, cultural, anthropological and philosophical insights. That some rules or laws *in themselves* seem to exert more pull to compliance than others is Franck’s starting point in his search for a theory of legitimacy.<sup>99</sup> The (perceived) fairness of international rules themselves is – according to Franck – the key to compliance. Legitimacy exerts a “pull to compliance” which is powered by the quality of the rule and of the rule-making institution and not by coercive authority.<sup>100</sup> Rules that are not fair exert little “compliance pull.” States comply with international rules, because they would like to act in accordance with the perceived fairness of the legal obligations. Franck argued that compliance with international rules is a “matter of degree” because some rules have a higher legitimacy ratio or index than others.<sup>101</sup> International rules vary in the extent they are able to exert a “compliance pull” on those to whom they are addressed.

Franck mainly focused on the legitimacy of *rules* but also paid attention to the legitimacy of *institutions and processes* through which the rules come into being, because the legitimacy of a rule depends – according to Franck – on the legitimacy of the rule-giving institution. He defined legitimate institutions as: institutions that are established and function in accordance with ascertainable principles of right process.<sup>102</sup> But when are rules and the rule-making institutions and process legitimate? Franck identified four indicators of rule-legitimacy in the community of States, being: determinacy, symbolic validation, coherence and adherence. When these four elements are present in a rule or in the rule process, they appear to exert a strong “compliance pull” on States to comply with the rule.<sup>103</sup> When these elements are lacking, Franck argued that States would easier ignore the institution and avoid the rules to pursue the State’s short-term self-interest.<sup>104</sup> However, although he considered the “compliance pull” to be very strong, he also acknowledged that other pulls could be stronger in particular circumstances. Franck argued: “each rule has an inherent pull power that is independent of the circumstances in which it is

<sup>97</sup> T.M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, 1990, p. 25.

<sup>98</sup> T.M. Franck, Legitimacy in the International System, *American Journal of International Law*, Volume 82, 1988, p. 706.

<sup>99</sup> *Ibid*, p. 708.

<sup>100</sup> T.M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, 1990, p. 26 and p. 48. T.M. Franck noted the following: “In the international system, unlike the national legal systems, if rules are obeyed it cannot be because the subject fears the coercive power of the sovereign. There is no global sovereign, no global sheriff.”

<sup>101</sup> T.M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, 1990, p. 41-49.

<sup>102</sup> *Ibid*, p. 64.

<sup>103</sup> T.M. Franck, Legitimacy in the International System, *American Journal of International Law*, Volume 82, 1988, p. 712.

<sup>104</sup> *Ibid*, p. 712; and Thomas M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, 1990, p. 49.



exerted, and that varies from rule to rule.”<sup>105</sup> This pull power is its index of legitimacy. An analysis of Frank’s four indicators can be found below.

#### 4.3.2 Determinacy<sup>106</sup>

The first indicator of legitimacy is rule-clarity or textual determinacy. This linguistic element examines the literary properties of the text itself. Determinacy is defined by Franck as “the ability of the text to convey a clear message, to appear transparent in the sense that one can see through the language to the meaning.”<sup>107</sup> In other words: if the rule’s requirements are transparent and clear, those addressed know exactly what is expected of them. This is a necessary first step towards compliance with the rule. Franck also acknowledged that some degree of indeterminacy is inevitable in any body of rules and indeterminacy may even have benefits, such as promoting agreement and permitting a flexible response.<sup>108</sup> However, indeterminate or vague rules also have its costs. Indeterminate rules not only make it harder to know what is expected, but also make it easier to justify non-compliance.<sup>109</sup> A vaguely defined and fuzzy rule is elastic, open to manipulation, and thus a broad interpretation of this rule will eventually result in non-compliance.<sup>110</sup> Franck therefore argued: “the degree of determinacy of a rule directly affects the degree of its perceived legitimacy.”<sup>111</sup> Determinacy increases the legitimacy of a rule and a high degree of determinacy goes therefore hand in hand with a high degree of compliance. The more determinate the rule, the more difficult it is to resist the pull to compliance and to justify non-compliance.<sup>112</sup> Franck also noted that there is another way in which determinacy increases the legitimacy of a rule. He argued that highly transparent rules of conduct actually *encourage* rule compliance.

#### 4.3.3 Symbolic validation<sup>113</sup>

The second indicator of legitimacy is symbolic validation, ritual and pedigree. This cultural and anthropological element examines the rule’s legitimacy in the light of its ability to communicate.<sup>114</sup> The rule must be characterized as an important part of a system of social order. It is not the content that needs to be communicated, but the validity or authenticity. This communication is symbolic

<sup>105</sup> T. M. Franck, Legitimacy in the International System, *American Journal of International Law*, Volume 82, 1988, p. 712.

<sup>106</sup> Ibid, p. 713-725; and Thomas M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, 1990, p. 50-90

<sup>107</sup> T.M. Franck, Legitimacy in the International System, *American Journal of International Law*, Volume 82, 1988, p. 713.

<sup>108</sup> T.M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, 1990, p. 53.

<sup>109</sup> Ibid, p. 54; and Thomas M. Franck, Legitimacy in the International System, *American Journal of International Law*, Volume 82, 1988, p. 714.

<sup>110</sup> Ibid, p. 714-715.

<sup>111</sup> Ibid, p. 716.

<sup>112</sup> Ibid, p. 714 and p. 719; and T.M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, 1990, p. 54.

<sup>113</sup> T.M. Franck, Legitimacy in the International System, *American Journal of International Law*, Volume 82, 1988, p. 725-735; and T. M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, 1990, p. 91-134.

<sup>114</sup> T.M. Franck, Legitimacy in the International System, *American Journal of International Law*, Volume 82, 1988, p. 725.

rather than literal. Franck labelled these symbolic validating communications as “cues.”<sup>115</sup> The role of cues is to validate nations, institutions and rules.<sup>116</sup> Franck defined *symbolic validation* of a rule, or a rule-making process, or institution as: “a signal used as a cue to elicit compliance with a command.”<sup>117</sup> Symbolic cues may be objects, songs, acts, or spoken words. An example given by Franck is the singing of the national anthem, because it is a vocal signal symbolically reinforcing the citizen’s relationship to the State. Franck explained that *rituals* are a specialized form of symbolic validation, “marked by ceremonies, often mystical, which provide unenunciated reasons or cues for compliance with the commands of persons or institutions.”<sup>118</sup> Rituals are often a cue presented as drama, primarily operate at the symbolic level and they serve to communicate and ratify the beliefs and values of “a system”.<sup>119</sup> Rituals reinforce the rules and authority structure of a community by embracing and involving an in-group and by excluding an out-group, which cannot share in, or understand, the symbolic communications code.<sup>120</sup> An example given by Franck is the swearing in of a new U.S. president, in order to validate a community and thus reinforce the rule structure that upholds its unity and its values. *Pedigree* is another (universal) form of symbolic validation. Pedigree seeks to enhance the “compliance pull” by emphasizing the historical origins and the cultural or anthropological deep-rootedness of the rule or the rule-making authority.<sup>121</sup> Franck gave the example of “recognition”, i.e. a new State’s election to membership in the UN.

Symbolic validation may use ritual, pedigree, or both, as cues to secure compliance.<sup>122</sup> Franck provided many examples of the use of ritual, pedigree and other symbols to reinforce legitimacy in the international system. He showed that the legitimacy of the system of rules and institutions is undermined when its validating symbols and rituals are violated. Symbolic validation thus exerts a “compliance pull” on those to whom the cues of ritual or pedigree are communicated. Cues succeed in communicating legitimacy if they evoke reality and if those addressed perceive them as true. Conversely, when cues are false and do not refer symbolically to what is perceived as a historic, social, political or metaphysical reality, the capacity of cues to exert a “compliance pull” is diminished.

<sup>115</sup> T.M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, 1990, p. 91.

<sup>116</sup> *Ibid.*, p. 134.

<sup>117</sup> T.M. Franck, Legitimacy in the International System, *American Journal of International Law*, Volume 82, 1988, p. 725; and T.M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, 1990, p. 93.

<sup>118</sup> T.M. Franck, Legitimacy in the International System, *American Journal of International Law*, Volume 82, 1988, p. 725; and T.M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, 1990, p. 93.

<sup>119</sup> T.M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, 1990, p. 93.

<sup>120</sup> *Ibid.*

<sup>121</sup> T.M. Franck, Legitimacy in the International System, *American Journal of International Law*, Volume 82, 1988, p. 726.

<sup>122</sup> T.M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, 1990, p. 97.

#### 4.3.4 Coherence<sup>123</sup>

The third indicator of legitimacy is coherence. Both determinacy and symbolic validation are connected to coherence. Franck observed that a rule is coherent when similar cases are treated alike in application of the rule and when rules relate to other rules of the same system.<sup>124</sup> Another aspect of coherence is – according to Franck – that it encompasses the further notion that a rule gathers force if it is seen to be connected to a network of other rules by an underlying general principle.<sup>125</sup> In other words, if a rule might seem inconsistent in its application and therefore unequally applied, it also needs to be determined that no reasonable principle of general application could justify the inequality. If a rule is unequal and also unprincipled, the legitimacy is severely depleted. The degree of a rule's legitimacy thus depends on its coherence, both internally (among the several parts and purposes of the rule) and externally (between one rule and other rules, through shared principles).<sup>126</sup> According to Franck, coherence legitimizes a rule, principle, or implementing institution, because: "it provides a reasonable connection between a rule, or the application of a rule, to 1) its own principled purpose, 2) principles previously employed to solve similar problems, and 3) a lattice of principles in use to resolve different problems."<sup>127</sup> If a rule is applied coherent, it will be able to exert a "compliance pull." Problems arise when standards are not applied coherently. For example when rules apply to some, but not to others equally entitled. Or when the rules are not connected to principles of general applicability.<sup>128</sup>

#### 4.3.5 Adherence<sup>129</sup>

The fourth indicator of legitimacy is predominantly philosophical and refers to adherence to a normative hierarchy. Franck quoted Hart who considered the international system to be primitive because individual rules lack adherence to a rule hierarchy. With adherence, Franck means "the vertical nexus between a single primary rule of obligation [...] and a pyramid of secondary rules about how rules are made, interpreted and applied."<sup>130</sup> In other words, these are rules about the rules. Franck labelled them as secondary rules of process. If primary rules of obligation lack adherence to secondary rules of process, they are nothing more than "ad hoc reciprocal arrangements."<sup>131</sup> Thus, when primary rules are connected to a procedural and institutional framework of an organized community, the rules are more legitimate. Franck explained that there are nowadays lawmaking institutions and courts in the international

<sup>123</sup> T.M. Franck, Legitimacy in the International System, *American Journal of International Law*, Volume 82, 1988, p. 735-751.

<sup>124</sup> *Ibid*, p. 741; and R. Dworking, *Law's Empire*, Belknap Press of Harvard University Press, 1986, p. 176-224.

<sup>125</sup> T.M. Franck, Legitimacy in the International System, *American Journal of International Law*, Volume 82, 1988, p. 741.

<sup>126</sup> T.M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, 1990, p. 180.

<sup>127</sup> *Ibid*, p. 147-148.

<sup>128</sup> T.M. Franck, Legitimacy in the International System, *American Journal of International Law*, Volume 82, 1988, p. 738.

<sup>129</sup> *Ibid*, p. 751-759.

<sup>130</sup> *Ibid*, p. 751-752.

<sup>131</sup> *Ibid*, p. 752.

system. States accept that they are members of a community with secondary rules and recognize that they derive validation from membership in this international community. States have an obligation to comply to a treaty once they have signed and ratified them. However, Franck argued that this obligation does not only derive from consent to the treaty, but also from membership in the international community. Thus, Franck concludes that the obligation of States to comply with treaties is acquired associatively, rather than by specific consent. It is owed generally towards all members of the community.<sup>132</sup>

#### 4.3.6 Concluding observations

According to Franck and his 'legitimacy theory', States comply with international rules, because there is a "compliance pull" on States by considerations of legitimacy. The more legitimate rules are and the more legitimate institutions appear to be, the greater is compliance with these rules. The key element explaining compliance is fairness: if rules are not perceived to be fair, they will exert little compliance pull. Franck argued that States comply with legal rules that they perceive as being made in accordance with the right process. Franck identified four indicators (determinacy, symbolic validation, coherence and adherence) that predict the right process and thus the "pull" or strong pressure towards compliance.

#### 4.4 Koh's transnational legal process theory

Harold H. Koh presented in his articles *Transnational Legal Process*<sup>133</sup> and *Why Do Nations Obey International Law?*<sup>134</sup> another IL theory of compliance, namely the theory of 'transnational legal process'. Koh's starting point is that international law is generally complied with and enforced by a so-called transnational legal process. He acknowledged that he is, in that sense, quite traditional: "I found myself sounding like Louis Henkin, arguing that the glass is half full."<sup>135</sup> Koh argued that, for more than forty years, international legal scholars have studied the transnational legal process without knowing it.<sup>136</sup> He claimed that transnational legal process lies not only at the heart of what international legal scholarship is about, but also at the heart of what international law scholarship should be about in the future. According to Koh, his transnational legal process theory "provides the key to understand the critical issue of compliance with international law."<sup>137</sup> He presented both a theoretical explanation of why States comply, but also a plan of strategic action for stimulating States to comply with international law.<sup>138</sup>

<sup>132</sup> T.M. Franck, Legitimacy in the International System, *American Journal of International Law*, Volume 82, 1988, p. 758.

<sup>133</sup> H.H. Koh, Transnational Legal Process, *Nebraska Law Review*, Volume 75, 1996.

<sup>134</sup> H.H. Koh, Why Do Nations Obey International Law?, *Yale Law Journal*, Volume 106, 1997.

<sup>135</sup> H.H. Koh, Transnational Legal Process, *Nebraska Law Review*, Volume 75, 1996, p. 194.

<sup>136</sup> *Ibid*, p. 207.

<sup>137</sup> *Ibid*, p. 183.

<sup>138</sup> H.H. Koh, Why Do Nations Obey International Law?, *Yale Law Journal*, Volume 106, 1997, p. 2655.

#### 4.4.1 *Reflection on Chayes & Chayes and Franck*

In his transnational legal process theory, Koh combined the managerial and fairness approaches. Therefore, he first reflected on the books of Chayes & Chayes and Franck, before he explained his own theory in more detail. He considered both the managerial and the fairness approach as the “most comprehensive and sophisticated efforts to date to address this demanding [compliance] question.” However, Koh also suggested what Chayes & Chayes and Franck have gotten right, wrong, and incomplete.<sup>139</sup> He noted that Franck’s book reflected and complemented the Chayes & Chayes’ approach. Koh argued that in both the managerial theory as the legitimacy theory overlooked the account of transnational legal process. Both Chayes and Franck have, according to Koh, avoided explaining the process whereby repeated compliance gradually becomes “habitual obedience.”<sup>140</sup> Although both Chayes & Chayes and Franck have posed the critical ‘why-question’ many times, they left – according to Koh – this question unanswered in their theories.<sup>141</sup> Koh concluded that the books of Chayes & Chayes and Franck are very instructive, but “give shape to only parts of the blind men’s elephant.”<sup>142</sup> In his articles, Koh therefore tried to develop a more complete theory about State compliance, by combining the managerial and fairness theories with a “deeper analysis of how transnational legal process promotes the interaction, interpretation, and internalization of international legal norms.”<sup>143</sup> According to Koh, the transnational legal process theory provides the “missing link,”<sup>144</sup> and presents the “key to unlocking the ancient puzzle of why nations obey.”<sup>145</sup> He used many examples to justify this claim, especially in the field of human rights.

#### 4.4.2 *Internalized compliance*

Koh argued that the key to better compliance is more internalized compliance, or “obedience.”<sup>146</sup> Like Chayes & Chayes and Franck, Koh is also convinced that better compliance with international law will be reached by voluntary obedience and not by coerced compliance (although he recognizes that coercion is sometimes necessary). Interestingly, to give his argument more strength, Koh also referred to social psychologists and criminologists who studied why individuals comply with national laws. After extensive empirical study, they concluded that people comply with the law, not because they fear punishment, but because they feel that legal authorities are legitimate.<sup>147</sup> But what is transnational legal process? Koh defined “transnational legal process” as the theory and practice of how public and private actors including States, international organizations, multinationals, NGOs and private individuals,

<sup>139</sup> H.H. Koh, *Why Do Nations Obey International Law?*, *Yale Law Journal*, Volume 106, 1997, p. 2635-2645.

<sup>140</sup> *Ibid.*, p. 2603.

<sup>141</sup> H.H. Koh, *Transnational Legal Process*, *Nebraska Law Review*, Volume 75, 1996, p. 183.

<sup>142</sup> H.H. Koh, *Why Do Nations Obey International Law?*, *Yale Law Journal*, Volume 106, 1997, p. 2602.

<sup>143</sup> *Ibid.*, p. 2603.

<sup>144</sup> *Ibid.*, p. 2648.

<sup>145</sup> *Ibid.*, p. 2659.

<sup>146</sup> *Ibid.*, p. 2646.

<sup>147</sup> T.R. Tyler, *Why People Obey the Law*, Yale University Press, 1990, reissued with a new afterword: Princeton University Press, 2006.

interact in a variety of public and private, domestic and international fora to make, interpret, enforce and internalize rules of transnational law.<sup>148</sup>

#### 4.4.3 Interaction, interpretation and internalization

The process of internalized compliance has three phases.<sup>149</sup> In the first phase, one or more transnational actors provoke interaction or series of interactions with other governmental and non-governmental actors in the international system. In the second phase, the interaction forces an interpretation of the international laws to the situation. In the third phase, the new interpretation of the international law is internalized in the actor's internal normative system. The aim of this internalization process is to "bind that other party to obey the interpretation as part of its internal value set."<sup>150</sup> Koh further distinguished between social, political and legal internalization. *Social internalization* occurs when a norm acquires so much public legitimacy that there is widespread general obedience to it. *Political internalization* occurs when political leaders accept an international norm and adopt it as a government policy. *Legal internalization* occurs when an international norm is incorporated into the national legal system, through executive action, legislation and judicial decisions. Koh explained that this transaction creates a legal rule that will, in the future, guide other transnational interactions between the actors. These future transactions will further internalize those norms and repeated participation in the process will help to reconstitute the interests of the actors in the process.<sup>151</sup> In the end, States define promoting the rule of international law as part of their national self-interest. Therefore, Koh's approach could be qualified as constitutive, in the sense of operating to reconstitute national interests.<sup>152</sup> Koh explained that the relationship between the three forms of internalization could be complex.<sup>153</sup> Therefore, he acknowledged: "the concept of transnational legal process has important complications, not just for international relations theorists, but also for activists and political leaders."<sup>154</sup>

#### 4.4.4 Four distinctive features

Koh explained that the main difference between international legal process and transnational legal process is the "focus on the transnational, normative, and constitutive character of global legal process."<sup>155</sup> He further clarified that the transnational legal process has four distinctive features.<sup>156</sup> In the first place, the theory is non-traditional, because Koh broke down the traditional private-public dichotomy and the traditional national-international dichotomy that was historically present in studies of international law. In the second place, the

<sup>148</sup> H.H. Koh, Transnational Legal Process, *Nebraska Law Review*, Volume 75, 1996, pp. 183-184; H.H. Koh, Why Do Nations Obey International Law?, *Yale Law Journal*, Volume 106, 1997, p. 2626.

<sup>149</sup> *Ibid*, p. 2646 and p. 2656.

<sup>150</sup> *Ibid*, p. 2646.

<sup>151</sup> *Ibid*.

<sup>152</sup> *Ibid*, p. 2627.

<sup>153</sup> *Ibid*, p. 2657.

<sup>154</sup> *Ibid*, p. 2658.

<sup>155</sup> *Ibid*, p. 2626.

<sup>156</sup> *Ibid*, p. 2627; H.H. Koh, Transnational Legal Process, *Nebraska Law Review*, Volume 75, 1996, p. 184.

theory is non-statist, because Koh focused not narrowly on States as the key-actors at the international level. He also took other significant non-State actors (such as multinationals, NGOs, private individuals) that emerged at the transnational stage into account. He considered non-State actors, international institutions and domestic political structures not just observers of the transnational legal process, but as “important mediating forces in international society.”<sup>157</sup> In the third place, the theory is dynamic and not static, because Koh focused on the continuities of process. He emphasized that transnational law transforms, mutates, and moves up and down, from public to private and from the national to the international level, and back again. In the fourth place, the theory is normative, because Koh does not embrace the descriptive workings in the process interaction, interpretation, internalization, enforcement, but he embraced the normativity of the process. Koh focused not simply on how international interaction among transnational actors shape law, but also on how law shapes and guides future transnational interactions. In Koh’s words: “how law influences why nations obey.”<sup>158</sup>

#### 4.4.5 Complex combination of factors

In his analysis, Koh mentioned that a combination of five factors could explain particular instances of national compliance with international law (although some of these factors are contradictory to what he stated before). These factors roughly correspond to five historical schools of thought of international lawyers and international relations scholars, seeking to explain national compliance with international laws. The first explanation Koh mentioned was coercion, while referring to the realist values of power and coercion. He suggested that States never truly comply with international law, but only comply with it when sufficiently coerced.<sup>159</sup> The second, and gentler, explanation Koh put forth was self-interest, favoured by the school of rational choice theory. He suggested that States might choose rationally to comply with international law out of a sense of self-interest, when the total benefits of doing so outweigh the costs.<sup>160</sup> In the third place, Koh argued that another factor explaining compliance is rule-legitimacy. He assumed that States comply with international law, guided by a sense of moral obligation derived from considerations of fairness, democracy and legitimacy.<sup>161</sup> Communitarianism is a fourth possible explanation that can be found in the English international society school of international relations and Grotius. They argue that States comply with international law because of the values of the international society of which they are a part.<sup>162</sup> And finally, an explanation could be the internalization of rules through socialization, political action, and legal process. Koh stressed that none of the theories or explanations

<sup>157</sup> H.H. Koh, *Why Do Nations Obey International Law?*, *Yale Law Journal*, Volume 106, 1997, p. 2624.

<sup>158</sup> H.H. Koh, *Transnational Legal Process*, *Nebraska Law Review*, Volume 75, 1996, p. 184

<sup>159</sup> H.H. Koh, *How is International Human Rights Law Enforced?*, *Indiana Law Journal*, Volume 74, 1999, p. 1401-1402.

<sup>160</sup> *Ibid.*, p. 1402.

<sup>161</sup> H.H. Koh, 1998 *Frankel Lecture: Bringing International Law Home*, Faculty Scholarship Series, Paper 2102, 1998, p. 635.

<sup>162</sup> H.H. Koh, *How is International Human Rights Law Enforced?*, *Indiana Law Journal*, Volume 74, 1999, p. 1405.

has “the monopoly on wisdom.”<sup>163</sup> According to Koh, all five explanations work together to help explain why nations comply with international law. They are “complementary conceptual lenses to give a richer explanation of why compliance with international law does, or does not, occur in particular cases.”<sup>164</sup> As Koh phrases: “Each theory or factor gets a piece of the puzzle right, but none alone captures the entire picture.”<sup>165</sup> In the end, Koh argued that the transnational legal process had been overlooked as a key factor.

#### 4.4.6 Human rights and the transnational legal process

In his article *How Is International Human Rights Law Enforced?*<sup>166</sup> Koh applied his transnational legal process theory to the international human rights framework. He compared the non-compliance with laws at the national level (“Even here in Bloomington, Indiana, the height of civilization, are the parking laws or burglary laws perfectly enforced?”)<sup>167</sup> with the non-compliance with human rights norms at the international level (“This process works sporadically, and that we often most clearly see its spectacular failures, as in Cambodia, Bosnia and Rwanda.”)<sup>168</sup> Koh argued that international human rights norms are enforced in much the same way as national laws, through the transnational legal process. The three phases are the institutional interaction whereby global norms of international human rights are debated, interpreted, and ultimately internalized by national legal systems.<sup>169</sup> On the one hand, this process does not always work very well. On the other hand, Koh argued that sometimes the process of enforcing international human rights law has its successes “which gives us reason not to ignore that process, but try to develop and nurture it.”<sup>170</sup>

#### 4.4.7 The horizontal story of human rights law enforcement

Koh further elaborated on the “horizontal story”<sup>171</sup> on human rights law enforcement. He described how international human rights law was born, as a product of the UN Charter, the Nuremberg and Tokyo war crimes trials and the UDHR. Under this conventional international legal process view, the principal enforcers of human rights law have always been States, who interacted with each other on an inter-State, government-to-government level. At this horizontal intergovernmental level, governments and inter-governmental organizations (UN Human Rights Commission/UN Human Rights Committee)

<sup>163</sup> H.H. Koh, 1998 *Frankel Lecture: Bringing International Law Home*, Faculty Scholarship Series, Paper 2102, 1998, p. 635.

<sup>164</sup> H.H. Koh, How is International Human Rights Law Enforced?, *Indiana Law Journal*, Volume 74, 1999, p. 1406.

<sup>165</sup> H.H. Koh, 1998 *Frankel Lecture: Bringing International Law Home*, Faculty Scholarship Series, Paper 2102, 1998, p. 635.

<sup>166</sup> H.H. Koh, How is International Human Rights Law Enforced?, *Indiana Law Journal*, Volume 74, 1999. The text of this article is very similar to H.H. Koh, 1998 *Frankel Lecture: Bringing International Law Home*, Faculty Scholarship Series, Paper 2102, 1998.

<sup>167</sup> H.H. Koh, How is International Human Rights Law Enforced?, *Indiana Law Journal*, Volume 74, 1999, p. 1397.

<sup>168</sup> *Ibid.*, p. 1399.

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*, p. 1408-1409.



did put pressure on each other to comply with human rights, invoking universal treaty norms as the ICCPR and the ICESCR. New mechanisms were created: judicial (the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda), new executive actors (United Nations High Commissioner on Human Rights) and quasi-legislative (Vienna Conference on Human Rights, Beijing Women's Conference). However, Koh argued that "despite these occasional advances, the overall picture of this standard enforcement story is one of impotence, ineffectiveness, of a horizontal system where the key actors are nation-States and intergovernmental organizations, the key forums are governmental forums, and the key transactions are transactions between States and other States."<sup>172</sup>

#### 4.4.8 *The vertical story of human rights law enforcement*

Koh argued that the "horizontal story" is not wrong, but incomplete, because "it does not capture the full picture of how international human rights norms are currently generated, brought into domestic systems, and then brought back up to the international level."<sup>173</sup> According to him, the "vertical story"<sup>174</sup> of human rights enforcement is much richer and focuses on a transnational legal process that includes "a different set of actors, fora and transactions."<sup>175</sup> He explained that the human rights norm-internalization did not begin by States, but by private transnational organizations and individuals who mobilized popular opinion and political support within their country and abroad for the development of a universal human rights norm.<sup>176</sup> Examples are Christian peace activists, the International Committee of the Red Cross and the Anti-Slavery Society. According to Koh, these non-governmental actors seek to develop transnational networks to discuss and generate political solutions among concerned individuals at the national, regional and international levels, among government agencies, intergovernmental organizations, academics, and private foundations. These transnational actors (or "norm entrepreneurs") seek governmental and non-governmental fora capable of declaring norms of international law (treaties) and specific interpretations of those norms in particular circumstances (interpretation of treaties or customary law). This law declaring fora create an global "interpretive community" that includes – according to Koh – treaty regimes; domestic, regional and international courts; ad hoc tribunals; domestic and regional legislatures; executive entities; international publicists; and NGOs. The next vertical step is to internalize norm-interpretations issued by the "interpretive community" into their national bureaucratic and political structures. Through a repeated cycle of interaction, interpretation, and internalization, Koh argued that States will comply with international human rights law "out of a perceived self-interest that becomes institutional habit."<sup>177</sup>

<sup>172</sup> H.H. Koh, How is International Human Rights Law Enforced?, *Indiana Law Journal*, Volume 74, 1999, p. 1409.

<sup>173</sup> *Ibid.*, p. 1412.

<sup>174</sup> *Ibid.*, p. 1409-1411

<sup>175</sup> *Ibid.*, p. 1409.

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.*, p. 1411.

Koh concluded his article *How Is International Human Rights Law Enforced?*<sup>178</sup> with answering the question on how international human rights law is enforced: “not just by nation-States, not just by government officials, not just by world historical figures, but by people like us, by people with the courage and commitment to bring international human rights law home through a transnational legal process of interaction, interpretation, and internalization.”<sup>179</sup>

#### 4.4.9 Concluding observations

Koh provides an explanatory framework for understanding how and why the process of norm-internalization is considered to be the key to understanding State compliance with international law.<sup>180</sup> He explained that the best strategies are not the horizontal regime management strategies, but rather, vertical strategies.<sup>181</sup> His transnational legal process theory claims that States comply with international law in general and the international human rights framework in particular, because of a transnational legal process of interaction, interpretation and internalization. Factors explaining particular instances of compliance include: coercion, self-interest, rule-legitimacy, communitarianism and the values of the international society of which States are a part.

## 5 INTERNATIONAL RELATIONS THEORIES EXPLAINING COMPLIANCE

### 5.1 Realism

Realism started to emerge as a school of thought in IR theory in the 1940s. However, the realist primary assumptions have been expressed in earlier – even ancient – writings. The most famous text in realist tradition is to be found in *The History of the Peloponnesian War*<sup>182</sup> of Thucydides (460–411 B.C.E.). He is often portrayed as the father of the school of political realism. He is an ancient Greek historian and argued: “The strong do what they can and the weak suffer what they must.”<sup>183</sup> This oft-quoted sentence can be considered the core of realist thinking. Another important realist thinker is Machiavelli (1469-1527), a Florentine political philosopher, who wrote *Il Principe*. He argued that the sole aim of a politician is to seek power, regardless of religious or ethical considerations. The last important thinker associated with realism is Hobbes (1588-1679) who stated in *Leviathan* that the state of nature is a state of war of all against all (*bellum omnium contra omnes*). These three realist thinkers are generally considered to present “the most powerful expressions of realism in the Western tradition of political theory.”<sup>184</sup>

<sup>178</sup> H.H. Koh, *How is International Human Rights Law Enforced?*, *Indiana Law Journal*, Volume 74, 1999.

<sup>179</sup> *Ibid*, p. 1417.

<sup>180</sup> O.A. Hathaway, *Do Human Rights Treaties Make a Difference?*, *Yale Law Journal*, Volume 112, 2002, p. 1960.

<sup>181</sup> *Ibid*, 2656.

<sup>182</sup> Thucydides, *The History of the Peloponnesian War*, Penguin books, 1972.

<sup>183</sup> *Ibid*, p. 394.

<sup>184</sup> J. Donnelly, *Realism and International Relations*, Cambridge University Press, 2000, p. 13.

### 5.1.1 Classical realism

The most traditional version of realism called “classical realism” has long been the dominant theory among IR scholars. Classical realism was born in challenging the value-driven nature of the idealist approach in the aftermath of World War I.<sup>185</sup> The goal of the idealist was to build peace with the creation of a system of international law, backed by international institutions, procedures, and practices in order to prevent another world conflict.<sup>186</sup> Idealist emphasized the common interests that could unite humanity. However, in the 1940s and 1950s, realist scholars challenged and criticized this “interwar idealism,”<sup>187</sup> because of the unscientific nature of their knowledge. Realists like Carr even used the term “utopians”<sup>188</sup> to refer to idealists and blamed the idealists’ focus on how the world ought to be instead of how it actually was.<sup>189</sup> Morgenthau is generally recognized as the leading realist thinker.<sup>190</sup> He saw realism as a product of human nature. Fundamental aspects of human nature are the drive for power and the will to dominate.<sup>191</sup> He wrote in *Politics Among Nations* the following: “the main signpost that helps political realism to find its way through the landscape of international politics is the concept of interest defined in terms of power.”<sup>192</sup>

In general, classical realists assume that the international system is immutably anarchic, that States are the primary actors and that all States are unitary, rational actors. The international system is anarchic, because it lacks an authoritative government. There is no common power that can enact and enforce rules of behaviour. Because of this absence, realists argue: “the law of the jungle still prevails.”<sup>193</sup> Another realist assumption is that States are exclusively driven by competitive self-interest. The protection of the State’s territorial integrity is the most important goal above all other goals.<sup>194</sup> The primary concern of all States is survival and States have an interest in maximizing their power. When reflecting on the realist approach, Slaughter

<sup>185</sup> M. Kurki and C. Wight, *International Relations and Social Science*, in: T. Dunne et al., *International Relations Theories: Discipline and Diversity*, Oxford University Press, 2009, p. 17.

<sup>186</sup> Idealism is an approach to IR that is often associated with Woodrow Wilson, the founder of the League of Nations and the Kellogg-Briand Pact, see also D.S. Papp, *Contemporary International Relations: Frameworks for Understanding*, Pearson, 2001.

<sup>187</sup> B.C. Schmidt, *Anarchy, World Politics and the Birth of a Discipline: American International Relations, Pluralist Theory and the Myth of Interwar Idealism*, *International Relations*, Volume 16, No. 1, 2002.

<sup>188</sup> E.H. Carr, *The Twenty Years’ Crisis 1919-1939: An Introduction to the Study of International Relations*, Palgrave Macmillan, 2001, introduction xxi.

<sup>189</sup> B.E.S. Mgonja and I.A.M. Makombe, *Debating international relations and its relevance to the third world*, *African Journal of Political Science and International Relations*, Volume 3, No. 1, 2009, p. 30.

<sup>190</sup> Since it is impossible within the scope of this literature review to introduce all of the thinkers who contributed to the development of twentieth-century classical realism, Morgenthau, as perhaps the most influential among them, has been selected for discussion here. Other influential classical realists are Carr, Schwarzenberger, Kennan, Spykman, Kahn, Herz, Von Clausewitz and Aron.

<sup>191</sup> Realists view human beings as inherently egoistic and self-interested.

<sup>192</sup> H. Morgenthau and K. Thompson, *Politics Among Nations*, McGraw-Hill, 1985, p. 165. See generally also H. Morgenthau, *Positivism, Functionalism, and International Law*, *The American Journal of International Law*, Volume 34, No. 2, 1940.

<sup>193</sup> J. Donnelly, *Realism and International Relations*, Cambridge University Press, 2000, p. 10.

<sup>194</sup> D. Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford University Press, 2003, p. 51.

nicely pointed out that “For realists, power is the currency of the international system. States interact with one another within that system like billiard balls: hard, opaque, unitary actors colliding with one another.”<sup>195</sup> Because State behaviour is determined by the balance of power, States will not pursue cooperation on the basis of normative commitments.<sup>196</sup> It is difficult for States to ‘trust’ other States, because they can never be certain about the intentions of other States. States must constantly assume and prepare for the possibility of war with other States. Only if it advances the interest of States in maximizing their power and prospects for survival, international cooperation is possible. In the realist literature, special attention is afforded to powerful States as they have most influence at the international level. At the same time, little attention is given to less powerful States or to international institutions, Civil Society Organizations, multinational corporations, individuals and other actors. Realist considered them not to be important, because they have little influence on the international level.

### 5.1.2 Neorealism

The strong view of classical realists no longer dominates in IR theory, because after World War II a more nuanced approach called “neorealism” or “structural realism” came to the forefront.<sup>197</sup> Neorealism and classical realism do share the same assumptions: both have the international system as the appropriate level of analysis, both assume that the international system is anarchic, that the system is State-centric, both have a systemic focus, assume that States seek to ensure their survival, view international politics as inherently competitive, leave little room for international institutions and assume States are egoistic unitary actors that pursue self-help. However, neo-realism differs from classical realism by being less historicist, more positivist and more structuralist.

The neorealist approach was an attempt to construct a more scientific (more methodologically rigorous) approach to the study of IR. Kenneth Waltz is one of the founders<sup>198</sup> of this approach and in his book *Theory of International Politics*<sup>199</sup> he responds to the “liberal challenge” and the defects of the classical realism approach. Waltz observes power and State behaviour in a different way from the classical realists. While Morgenthau maintains that States have a will to power, Waltz begins his theory with the assumption that States ultimately seek survival. According to Waltz, power is a means to survival, not an end in itself. He argued that: “the first concern of States is not to maximize power but to maintain their position in the system.”<sup>200</sup> The basic “units” of the international system are States. Because States merely want to survive, they are

<sup>195</sup> A. Slaughter, *International Law in a World of Liberal States*, *European Journal of International Law*, Volume 6, No. 1, 1995, p. 507.

<sup>196</sup> W.C. Bradford, *In the Minds of Men: A Theory of Compliance with the Laws of War*, SSRN, 6 June 2004, p. 6, available at <http://ssrn.com/abstract=555894> or doi:10.2139/ssrn.555894.

<sup>197</sup> For critiques of “classical realism”, see D. Snidal, *The Limits of Hegemonic Stability Theory*, *International Organization*, Volume 39, 1985, p. 579-614.

<sup>198</sup> Other prominent neorealists are Art, Jervis, Walt, Mearsheimer, Gilpin, Grieco, Lieber and Strange.

<sup>199</sup> K.N. Waltz, *Theory of International Politics*, McGraw-Hill, 1979.

<sup>200</sup> *Ibid*, p. 126.

therefore driven to maximize security. He explains that international politics take place in an international environment defined by anarchy and filled with States that are “unitary actors who, at a minimum, seek their own preservation and, at a maximum, drive for universal domination.”<sup>201</sup> To him, the decentralized nature of the international legal system is problematic. In the absence of central authority, the fundamental interest of each State is security. According to neorealists, “security is their [States’] overriding goal, and self-help their guiding principle.”<sup>202</sup> To ensure State security, States must be on constant preparation for conflict through economic and military build-up. Waltz put the focus predominantly on the anarchic ‘structure’ of the international system. This political structure is defined and distinguished by their ordering principle (hierarchy and anarchy), differentiation of functions among States and the distribution of capabilities among them.<sup>203</sup> According to Waltz, this is of fundamental importance to understand crucial international outcomes. This emphasis on the permanence of the conflict characterizes the neorealism approach and means that States are potentially dangerous to each other.<sup>204</sup> Insecurity and unequal gains are according to Waltz the two reasons why there is limited cooperation in the anarchic international system. States are afraid that the possible gains they might have when cooperating with each other, may favour other States more than itself. This might in turn lead to dependence on others: “States do not willingly place themselves in situations of increased dependence. In a self-help system, considerations of security subordinate economic gain to political interest.”<sup>205</sup> Thus, structural realists assume that the anarchical structure of the international system will inevitably lead to insecurity and thus competition for power.<sup>206</sup>

Neorealists used concepts drawn from microeconomics and game theory to understand and explain international cooperation and conflict. Game theory gained considerable popularity in the study of IR over the past few decades. Waltz argued that States in the international system are like firms in a national economy and have the same fundamental interest, namely to survive: “Internationally, the environment of States’ actions, or the structure of their system, is set by the fact that some States prefer survival over other ends obtainable in the short run and act with relative efficiency to achieve that end.”<sup>207</sup>

### 5.1.3 Compliance with international law

In general, the role of international law and more specifically with the international human rights framework is scarcely circumscribed in realist

<sup>201</sup> K.N. Waltz, *Theory of International Politics*, McGraw-Hill, 1979, p. 118.

<sup>202</sup> K.W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, *American Journal of International Law*, Volume 93, 1999, p. 132.

<sup>203</sup> J. Donnelly, *Realism and International Relations*, Cambridge University Press, 2000, p. 16-17.

<sup>204</sup> J.J. Mearsheimer, *The False Promise of International Institutions*, *International Security*, Volume 19, No. 3, 1994/1995, p. 10.

<sup>205</sup> K.N. Waltz, *Theory of International Politics*, McGraw-Hill, 1979, p. 107.

<sup>206</sup> A.C. Arend, *Do Legal Rules Matter? International Law and International Politics*, *Virginia Journal of International Law*, Volume 38, 1997/1998, p. 116.

<sup>207</sup> K.N. Waltz, *Theory of International Politics*, McGraw-Hill, 1979, p. 93.

theory of IR. According to Barker, “realists rarely considered the existence of international law, let alone its relevance to the relations of States.”<sup>208</sup> Most classical realists denied the value of international law and argued that international law is not relevant to international politics.<sup>209</sup> They tend to be highly sceptical that international norms could influence State behaviour.<sup>210</sup> They argue that ‘power and coercion’ rather than ‘the rule of law’, is the answer to the question why States comply with international law.<sup>211</sup> Most classical realists argue that international treaties exist only because powerful States benefit from their existence. In addition, international law is an instrument for powerful States to achieve their objectives. Thus, international law is complied with only when it is in the interest of dominant and powerful States, which coerce less powerful States into accepting the international legal framework and complying with it.<sup>212</sup> This coercion could go through reward for compliance or threatened sanctions for non-compliance. Thus, the level of compliance with international law will depend on the presence of the hegemon(s) and its use. In other words: States comply with international law, because “someone else makes them.”<sup>213</sup> This also means that States are not bound by international law, but remain free to violate international law whenever it is in their interest to do so. Given the classical realists’ emphasis on power, they are generally sceptical about the relevance of morality in international politics. Realists generally refused to apply moralistic principles, ethical premises or ideological notions to the actions of States, because interests were prioritized over ideologies.<sup>214</sup>

#### 5.1.4 Compliance with the human rights framework

Compliance with international law in general and the international human rights framework might be a complicated matter in this theory. For realists, it will be difficult to explain why States would be willing to incur costs of setting up a human rights framework to protect human rights, to provide the

<sup>208</sup> J.C. Barker, *International law and International Relations*, Continuum International Publishing Group, 2001, p. 74.

<sup>209</sup> K.W. Abbott, Modern International Relations Theory: A Prospectus for International Lawyers, *Yale Journal of International Law*, Volume 14, 1989, p. 344.

<sup>210</sup> Surprisingly, Morgenthau had a positivist conception of international law. He argued: “The great majority of the rules of international law are generally observed by all nations without actual compulsion, for it is generally in the interests of all nations concerned to honour their obligations under international law.” Morgenthau argued that international law is complied with it is because “most rules of international law formulate in legal terms such identical or complementary interests. It is for this reason that they generally enforce themselves, as it were, and there is generally no need for specific enforcement action.” See H. Morgenthau and K. Thompson, *Politics Among Nations*, McGraw-Hill, 1985, p. 290-291. However, later writers on classical realism (e.g. Kennan) rejected the notion of international law entirely. See also J.C. Barker, *International law and International Relations*, Continuum International Publishing Group, 2001, p. 73.

<sup>211</sup> R.B. Mitchell, Compliance Theory: A Synthesis, Compliance Theory: A Synthesis, *Review of European Community & International Environmental Law*, Volume 2, No. 4, 1993, p. 327.

<sup>212</sup> O.A. Hathaway, Do Human Rights Treaties Make a Difference?, *Yale Law Journal*, Volume 112, 2002, pp. 1945.

<sup>213</sup> H.H. Koh, How is International Human Rights Law Enforced?, *Indiana Law Journal*, Volume 74, 1999, p. 1402.

<sup>214</sup> Morgenthau argued: “Realism maintains that universal moral principles cannot be applied to the actions of states.” See H. Morgenthau and K. Thompson, *Politics Among Nations*, McGraw-Hill, 1985, p. 166.

framework with power to control and monitor and to agree with sanctioning measures to bring other States in compliance.<sup>215</sup> However, Waltz accepts the possibility that some countries are committed to human rights. He explains that human rights regimes are a result of powerful States that seek to impose their commitment to human rights on other States:<sup>216</sup> "Like some earlier great powers, we can identify the presumed duty of the rich and powerful to help others with our own beliefs about what a better world would look like. England claimed to bear the white man's burden; France spoke of her *mission civilisatrice* [...] for countries at the top, this is predictable behaviour."<sup>217</sup> In Waltz' view, States comply with the international human rights framework, because they are coerced by doing so by more powerful States. In essence, realists suggest that if compliance with international law occurs, it is not the force of law, but merely the result of coincidence between international law and the self-interest of States. If States comply with international law they do so because it is in their interest, even if the specific treaty did not exist. Most realists would likely predict that there is no relationship between human rights treaty ratification and government behaviour:<sup>218</sup> "If they [legal rules] affected the behaviour of international actors at all, it would only be at the margins."<sup>219</sup>

### 5.1.5 Concluding observations

Realism is a leading, well-established, but at the same time quite pessimistic IR theory. Mearsheimer summarized the realism approach in his article *The False Promise of International Institutions* and pointed out that: "realism paints a rather grim picture of world politics. The international system is portrayed as a brutal arena where States look for opportunities to take advantage of each other, and therefore have little reason to trust each other. Daily life is essentially a struggle for power, where each State strives not only to be the most powerful actor in the system, but also ensure that no other State achieves that lofty position."<sup>220</sup> Realism does not take into account national ideologies (nationalism, fascism, communism), nor domestic regime type (democracies, dictatorships), or non-State actors (international institutions, CSOs, multinational corporations, individuals).<sup>221</sup> Compliance with international law does not occur because the law is effective, but because "compliance is coincident with the path dictated by self-interest in a world governed by anarchy and relative State power."<sup>222</sup> Therefore, many realists see no relationship between human rights treaty

<sup>215</sup> O.A. Hathaway, Do Human Rights Treaties Make a Difference?, *Yale Law Journal*, Volume 112, 2002, p. 1946.

<sup>216</sup> Ibid.

<sup>217</sup> K.N. Waltz, *Theory of International Politics*, McGraw-Hill, 1979, p. 200.

<sup>218</sup> O.A. Hathaway, Do Human Rights Treaties Make a Difference?, *Yale Law Journal*, Volume 112, 2002, p. 1946-1947.

<sup>219</sup> A.C. Arend, Do Legal Rules Matter? International Law and International Politics, *Virginia Journal of International Law*, Volume 38, 1997/1998, p. 116.

<sup>220</sup> J.J. Mearsheimer, The False Promise of International Institutions, *International Security*, Volume 19, No. 3, 1994/1995, p. 9.

<sup>221</sup> A. Slaughter, International Law in a World of Liberal States, *European Journal of International Law*, Volume 6, No. 1, 1995, p. 507.

<sup>222</sup> O.A. Hathaway, Do Human Rights Treaties Make a Difference?, *Yale Law Journal*, Volume 112, 2002, p. 1946.

compliance and State behaviour. They consider international law simply an epiphenomenon. Although this theory was dominant in IR for a long time, realism had to encounter a lot of criticism in the 1970s and 1980s.

## 5.2 Institutionalism

Institutionalism has been referred to as one of the most prominent theories of IR.<sup>223</sup> Institutionalism has many varieties and does not (yet) constitute one unified body of thought.<sup>224</sup> It comprises a family of differing theories and approaches, including for example functionalist and neo-functionalist approaches, regime theory, (neo-)liberal institutionalism, historical institutionalism, intergovernmental institutionalism, rational choice institutionalism, sociological institutionalism, 'new' institutionalism, collective security and critical theory.<sup>225</sup> All these approaches together form the institutionalist body of IR literature.

The 'functionalist approach' of Mitrany is the oldest institutional theory of IR. He is considered to be the founding father of institutionalism in IR theory.<sup>226</sup> Mitrany argued that international cooperation was the best way to create a peaceful international environment. The main rationale behind it was that "peace is more than the absence of violence."<sup>227</sup> Mitrany explained that the real security concern was not the preservation of peace between separate States, but rather the way in which they could be persuaded to cooperate.<sup>228</sup> In order to facilitate this cooperation, States would have to give (a portion of) their power to "functional agencies" or international institutions. Institutional theory suggests that if States do give their power to institutions, institutions can improve the likelihood of cooperation, even in the absence of a common government or other formal governance structure.<sup>229</sup>

### 5.2.1 Similarities between realism and institutionalism

Both realism and institutionalism share many assumptions and there are quite some similarities between the two IR theories. An early version of the institutionalist theory was referred to as "modified structural realism."<sup>230</sup> Both

<sup>223</sup> W.J. Aceves, Institutional Theory and International Legal Scholarship, *American University International Law Review*, Volume 12, No. 2, 1997, p. 235-241.

<sup>224</sup> K.W. Abbott, Toward a Richer Institutionalism for International Law and Policy, *Journal of International Law & International Relations*, Volume 8, 2005, p. 13.

<sup>225</sup> J.J. Mearsheimer, The False Promise of International Institutions, *International Security*, Volume 19, No. 3, 1994/1995, p. 14; P.A. Hall and R.C.R. Taylor, Political Science and the Three New Institutionalisms, *Political Studies*, Volume 44, No. 5, 1996, p. 936; A.C. Arend, Do Legal Rules Matter? International Law and International Politics, *Virginia Journal of International Law*, Volume 38, 1998, p. 118; O.A. Hathaway, Do Human Rights Treaties Make a Difference? *Yale Law Journal*, Volume 112, 2002, p. 1942-1948.

<sup>226</sup> D. Mitrany, *The Functional Theory of Politics*, St. Martin's Press, 1976.

<sup>227</sup> M. Alexandrescu, David Mitrany: From Federalism to Functionalism, *Transylvanian Review*, Volume 16, No. 1, 2007, p. 23.

<sup>228</sup> *Ibid.*, p. 29.

<sup>229</sup> W.J. Aceves, Institutional Theory and International Legal Scholarship, *American University International Law Review*, Volume 12, No. 2, 1997, p. 236.

<sup>230</sup> See A. Slaughter, International Law and International Relations Theory: A Dual Agenda, *The American Journal of International Law*, Volume 87, No. 2, 1993, p. 221.



IR theories see States as the primary actors in the international system and both assume that States are rational actors that behave on the basis of self-interest that seek to maximize their interest.<sup>231</sup> Institutionalists and realists also share the assumption that the international system is governed by anarchy and that the distribution of power is the underlying principle of world politics.<sup>232</sup>

### 5.2.2 Distinguishing characteristics of institutionalism

However, there are also important differences between the two IR theories. In the realists view, there is little room for international institutions, but institutionalism takes system-wide institutions – often referred to as “regimes” – rather seriously. Keohane became a well-known institutionalist in IR theory after the publication of his book *After Hegemony*.<sup>233</sup> Regimes are defined as “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations.”<sup>234</sup> Keohane explored why self-interested actors in world politics should seek to establish international regimes through mutual agreement.<sup>235</sup> Keohane explained that regimes make it easier for self-interested actors to realize their interests collectively.<sup>236</sup> He argued that international cooperation is essential in a world of economic interdependence. Shared economic interests create a “harmony of interests” among States, which in turn generate a demand for institutions that States will agree to follow.<sup>237</sup> By drawing upon economics, and game theory and collective action theory, institutionalist theory explain the benefits to be gained through international cooperation.<sup>238</sup> The role of institutions and regimes is to facilitate cooperation that is in the States’ long-term interests and to prevent short-term defections that might jeopardize those long-term interests.<sup>239</sup> In the end, the creation of these institutions and regimes can independently influence (both constrain and regulate) the behaviour of international actors.

<sup>231</sup> R.O. Keohane, *Institutional Theory and the Realist Challenge After the Cold World War*, in: David A. Baldwin, *Neorealism and Neoliberalism*, Columbia University Press, 1993, p. 271.

<sup>232</sup> R.O. Keohane, *Neoliberal institutionalism: A Perspective on World Politics*, in: *International Institutions and State Power*, Westview Press, 1989.

<sup>233</sup> R.O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton University Press, 1984.

<sup>234</sup> R.O. Keohane and Joseph S. Nye, *Power and Interdependence: World Politics in Transition*, Little, Brown, 1977, p. 19.

<sup>235</sup> R.O. Keohane, *The Demand for International Regimes*, *International Organization*, Volume 36, No. 2, 1982, p. 147; S.D. Krasner, *International Regimes*, Cornell University Press, 1983, p. 141.

<sup>236</sup> R.O. Keohane, *The Demand for International Regimes*, *International Organization*, Volume 36, No. 2, 1982, p. 147.

<sup>237</sup> A.L. Herbert, *Cooperation in International Relations: A Comparison of Keohane, Haas and Franck*, *Berkeley Journal of International Law*, Volume 14, No. 1, 1996, p. 226.

<sup>238</sup> A.C. Arend, *Do Legal Rules Matter? International Law and International Politics*, *Virginia Journal of International Law*, Volume 38, 1998, p. 118-119.

<sup>239</sup> D. Zaelke et al., *Making Law Work: Environmental Compliance & Sustainable Development*, Cameron May, 2005, p. 56.

### 5.2.3 Reasons for cooperation

The presupposition in institutionalist theory is that States do create institutions and regimes.<sup>240</sup> But why would self-interested States that seek to maximize their interest cooperate with each other through the creation of regimes and institutions? What are the advantages for States to participate in institutions? When Keohane discussed the value of regimes and institutions in *After Hegemony*, he asserted the following:

“They [institutions] enhance the likelihood of cooperation by reducing the costs of making transactions that are consistent with the principles of the regime. They create the conditions for orderly multilateral negotiations, legitimate and delegitimate different types of State action, and facilitate linkages among issues within regimes and between regimes. They increase the symmetry and improve the quality of the information that governments receive. By clustering issues together in the same forums over a long period of time, they help to bring governments into continuing interaction with one another, reducing incentives to cheat and enhancing the value of reputation. By establishing legitimate standards of behavior for States to follow and by providing ways to monitor compliance, they create the basis for decentralized enforcement founded on the principle of reciprocity.”

In other words: institutions reduce transaction costs in international affairs, increase and disseminate information to reduce uncertainty (i.e. to stabilize expectations) and facilitate communication.<sup>241</sup> In addition, institutions can promote learning, create conditions for orderly negotiations and facilitate linkages in complex negotiations.<sup>242</sup> Finally, institutions can also enhance the value of the reputation of a State for honouring commitments, facilitate monitoring of State behaviour to reduce the incentive to cheat and make decentralized enforcement of regime rules possible through the creation of reciprocity.<sup>243</sup> However, a prerequisite for institutionalist analysis is the identification of common interests among States. When there is no common interest, States will choose to act contrary to the rules of the regime or institution. In the end, the interests of States remain paramount.<sup>244</sup>

### 5.2.4 Compliance with international law

The original institutionalist theory did not focus on international law. For a long time, institutionalists have long avoided the ‘I’ word and did not discuss international law.<sup>245</sup> However, in the first years of the new millennium, institutionalists started to apply their theory to legal rules, legal regimes and international law. According to the institutionalists, international law exists and has a force, because it provides a means of achieving outcomes possible only

<sup>240</sup> A.C. Arend, Do Legal Rules Matter? International Law and International Politics, *Virginia Journal of International Law*, Volume 38, 1998, p. 120.

<sup>241</sup> A. Slaughter, *International Law and International Relations Theory: A Prospectus*, in: E. Benvenisti and M. Hirsch, *The Impact of International Law on International Cooperation: Theoretical Perspectives*, Cambridge University Press, 2004, p. 27.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

<sup>244</sup> A.C. Arend, Do Legal Rules Matter? International Law and International Politics, *Virginia Journal of International Law*, Volume 38, 1998, p. 121.

<sup>245</sup> J.C. Barker, *International Law and International Relations*, Continuum International Publishing Group, 2001, p. 77.

through coordinated behaviour: “States consent to commit themselves because doing so is the only way to achieve certain goals.”<sup>246</sup> Institutionalists argue that international institutions enhance compliance and they see compliance with international law as a “strategic” choice.<sup>247</sup> Compliance with international law can thus be explained as a winning long-term strategy to achieve long-term self-interested goals.<sup>248</sup> More specifically, States comply with international law as long as the costs of non-compliance outweigh the costs of continued compliance.<sup>249</sup> International law provides a real constraint, but only insofar non-compliance entails real costs. But what are, according to institutionalists the real costs of non-compliance? The answer to this question is in the first place concern for the State’s reputation and in the second place the threat of sanctions.<sup>250</sup>

Especially in relation to human rights treaties, the costs for a State to bring themselves into compliance might be very high. Particularly human rights treaties can require States to make potentially costly measures to make themselves into compliance with the treaty. Institutionalists argue that States would act in compliance with the human rights framework because of a threat of direct sanctions, or as a result of obtaining and maintaining a reputation and hence good citizenship.<sup>251</sup>

### 5.2.5 Concluding observations

Institutionalism developed as an alternative paradigm to realism in IR theory. Like realists, institutionalists are of the opinion that States are the primary actors in the international system, that States behave on the basis of self-interest and that the international system is governed by anarchy. However, institutionalist theory explains that international cooperation is possible and that international institutions or regimes play an important role in facilitating that cooperation. States comply with international law in general and the human rights framework in particular because of strategic choice, which means a weighing of compliance costs and benefits. States are strategic actors that will comply with international law as long as the long-term benefits of compliance outweigh the costs of non-compliance. The threats of direct sanctions and harm to reputation are important factors that States take into account when deciding to comply (or not) with international law.<sup>252</sup>

<sup>246</sup> O.A. Hathaway, ‘Do Human Rights Treaties Make a Difference?’, *Yale Law Journal*, Volume 112, 2002, p. 1950.

<sup>247</sup> *Ibid.*

<sup>248</sup> *Ibid.*, p. 1948.

<sup>249</sup> *Ibid.*, p. 1951.

<sup>250</sup> *Ibid.*, p. 1951.

<sup>251</sup> *Ibid.*, p. 1950-1951.

<sup>252</sup> Some scholars, including Abbott, have tried to further expand institutionalist theory. See K.W. Abbott, *Toward a Richer Institutionalism for International Law and Policy*, *Journal of International Law & International Relations*, Volume 8, 2005.

### 5.3 Liberalism<sup>253</sup>

Liberalism is – to a certain extent – founded on the work of Immanuel Kant. In his pamphlet *Perpetual Peace*<sup>254</sup> written in 1795, Kant argues that the first condition of perpetual peace is that “the civil constitution of every nation should be republican.” By “republican” Kant means a political society where juridical freedom is preserved on the basis of a representative government with a separation of powers.<sup>255</sup> Morally autonomous citizens are by means of representation a self-legislator who makes laws that apply to all citizens equally, including himself or herself.<sup>256</sup> He pointed out that: “If the consent of the citizenry is required in order to determine whether or not there will be war, it is natural that they consider all its calamities before committing themselves to so risky a game. [...] By contrast, under a nonrepublican constitution, where subjects are not citizens, the easiest thing in the world to do is to declare war.”<sup>257</sup> IR scholars later took up Kant’s claim.<sup>258</sup> His liberal internationalism was an early contribution to liberalism and more specifically the Democratic Peace Theory (see section 5.3.5).

#### 5.3.1 Development of the liberal IR theory

Liberalism was not directly recognized in IR scholarship as an alternative IR theory for realism or institutionalism. James Richardson argued that there is “no overarching liberal theory comparable to Waltz’s neorealism, but separate strands theory are loosely linked in that they draw on traditional liberal ideas.”<sup>259</sup> Several categories of liberalism have been distinguished, for example: ideational, republican, pluralist, commercial, regulatory, military, cognitive and sociological liberalism.<sup>260</sup> It was often difficult for political scientists to identify where realist or institutionalist explanations end and liberal theories begin.<sup>261</sup> Zacher and Matthew argued that liberalism should be considered an ‘approach’, not a ‘theory’, since “its propositions cannot be [...] deduced from its assumptions.”<sup>262</sup> However, Andrew Moravcsik sets himself precisely this

<sup>253</sup> The term ‘liberalism’ is used to refer to liberal IR theory.

<sup>254</sup> I. Kant, *Perpetual Peace*, in: Immanuel Kant and Ted Humphrey, *Perpetual Peace and Other Essays on Politics, History, and Morals*, Hackett Publishing, 1983.

<sup>255</sup> M.W. Doyle, Liberalism and World Politics, *The American Political Science Review*, Volume 80, No. 4, 1986, p. 1157.

<sup>256</sup> Ibid, p. 1158.

<sup>257</sup> I. Kant, *Perpetual Peace*, in: Immanuel Kant and Ted Humphrey, *Perpetual Peace and Other Essays on Politics, History, and Morals*, Hackett Publishing, 1983, p. 112-113.

<sup>258</sup> O.A. Hathaway, Do Human Rights Treaties Make a Difference?, *Yale Law Journal*, Volume 112, 2002, p. 1952.

<sup>259</sup> J.L. Richardson, *Contending Liberalisms in World Politics: Ideology and Power*, Lynne Rienner Publishers, 2001, p. 71.

<sup>260</sup> For a detailed description of all these categories of liberalism, see J.L. Richardson, *Contending Liberalisms in World Politics: Ideology and Power*, Lynne Rienner Publishers, 2001, p. 71-92 and A. Moravcsik, *Liberalism and International Relations Theory*, Center for International Affairs, Harvard University, Working Paper, 1992, p. 17-36.

<sup>261</sup> A. Slaughter, International Law and International Relations Theory: A Dual Agenda, *The American Journal of International Law*, Volume 87, No. 2, 1993, p. 227.

<sup>262</sup> M.W. Zacher and R.A. Matthew, *Liberal International Theory: Common Threads, Divergent Strands*, in: C.W. Kegley, *Controversies in International Relations Theory: Realism and the Neoliberal Challenge*, St. Martin’s Press, 1995, p. 107-150.

task and he became one of the most prominent liberal IR scholars. He argued that the liberal IR theory deserves to be treated as a “paradigmatic alternative empirically coequal with and analytically more fundamental than the two dominant theories in contemporary IR scholarship: realism and institutionalism.”<sup>263</sup> He noted that liberal IR theory was ignored for a long time and was not regarded as a major paradigmatic alternative for realism and institutionalism.<sup>264</sup> He integrated the major categories of international liberalism in a common framework for a liberal theory of IR that is according to him both “non-utopian and non-normative.”<sup>265</sup> Moravcsik’s central insight that distinguishes liberalism from other IR theories is that States are embedded in domestic and international civil society. His fundamental premise is that “the relationship between States and the surrounding domestic and transnational society in which they are embedded critically shapes State behavior by influencing the social purposes underlying State preferences.”<sup>266</sup> He thus argued that State preferences – rather than State capabilities (realism) or information and institutions (institutionalism) – are the most important determinant of State behaviour. These State preferences are influenced by societal ideas, interests and institutions. He identified three core assumptions of the liberal IR theory. In short, these assumptions are about the primary actors in the international system, the relationship of those actors to State institutions and the primary determinants of State relations with one another.<sup>267</sup>

### 5.3.2 Assumption 1: primacy of societal actors

Liberalism rejects the foundational premise of both realism and institutionalism that States are the unitary actors in the international system. This IR theory is not State-centred, but puts the focus on the domestic political processes instead. Liberalists argue that the key actors in international affairs are “members of domestic society, understood as individuals and privately-constituted groups with autonomous preferences.”<sup>268</sup> These privately constituted groups include IGOs, CSOs, multinational corporations and other non-State actors that operate in domestic and transnational civil society. They seek to promote their independent interests and/or values primarily in domestic politics and their demands (rather than objective conditions) determine State preferences. Moravcsik argues that it is essential to fully understand State action: “societal ideas, interests, and institutions influence State behaviour by shaping State preferences, that is, the fundamental social purposes underlying the strategic

<sup>263</sup> A. Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, *International Organization*, Volume 51, No. 4, 1997, p. 513.

<sup>264</sup> Interestingly enough, Moravcsik regarded institutionalism (Keohane’s regulatory liberalism) as a form of realism, not as a form of liberalism.

<sup>265</sup> A. Moravcsik, *Liberalism and International Relations Theory*, Center for International Affairs, Harvard University, Working Paper, 1992 and A. Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, *International Organization*, Volume 51, No. 4, 1997.

<sup>266</sup> *Ibid.*, p. 516.

<sup>267</sup> A. Slaughter, *International Law in a World of Liberal States*, *European Journal of International Law*, Volume 6, No. 1, 1995, p. 504.

<sup>268</sup> A. Moravcsik, *Liberalism and International Relations Theory*, Center for International Affairs, Harvard University, Working Paper, 1992, p. 2.

calculations of governments.”<sup>269</sup> He is of the opinion that domestic politics are principally important and argued: “one cannot fully understand State decisions in the international realms without understanding the domestic policies that underlie them.”<sup>270</sup> In other words: according to liberalists, politics is embedded in a social context, which determinedly restricts the intentions and possibilities of governments.<sup>271</sup> Liberalism rests on a “bottom-up” view of politics in which the society is analytically prior to the State and domestic State-society relations are the central issue of politics. Therefore, liberalism rejects the premise that the structure of the international system is the main determinant of State behaviour.

### 5.3.3 Assumption 2: State-society relations

Liberalism identified a link between individuals and privately constituted groups and State behaviour. States interact with these individuals and privately constituted groups in a complex process of both representation and regulation. Moravcsik argued: “all governments represent some segment of domestic society, whose interests are reflected in State policy.”<sup>272</sup> In liberalism, States are not seen as actors, but as representative agents for various governmental institutions (such as courts, legislative committees and administrative agencies)<sup>273</sup> and groups within civil society. They serve as so-called “transmission belts.”<sup>274</sup> They translate the preferences and social power of individuals and privately constituted groups into State policy. Government policy is therefore constrained by the underlying identities, interests, and power of these individuals and groups who persistently pressure the decision makers to pursue policies that are in line with their preferences.<sup>275</sup> However, no government rests on universal or unbiased political representation and we cannot ignore that “every government represents some individuals and groups more fully than others.”<sup>276</sup> The process of representation entails at the same time a regulation of the activities of all these individuals and privately constituted groups (including the social actors who are not represented). Not all governments represent the entire population and there are various forms of representation, ranging from pure tyranny to pure democracy. However, the extent of ‘representativeness’ is an important variable in explaining State policy and a determinant of what States do at the international level.

<sup>269</sup> A. Moravcsik, Taking Preferences Seriously: A Liberal Theory of International Politics, *International Organization*, Volume 51, No. 4, 1997, p. 513.

<sup>270</sup> O.A. Hathaway, Do Human Rights Treaties Make a Difference?, *Yale Law Journal*, Volume 112, 2002, p. 1953.

<sup>271</sup> A. Moravcsik, *Liberalism and International Relations Theory*, Center for International Affairs, Harvard University, Working Paper, 1992, p. 7.

<sup>272</sup> *Ibid.*, p. 9.

<sup>273</sup> L.R. Helfer, A. Slaughter, Toward a Theory of Effective Supranational Adjudication, *Yale Law Journal*, Volume 107, 1997, p. 277.

<sup>274</sup> A. Moravcsik, *Liberalism and International Relations Theory*, Center for International Affairs, Harvard University, Working Paper, 1992, p. 10.

<sup>275</sup> A. Slaughter, International Law in a World of Liberal States, *European Journal of International Law*, Volume 6, No. 1, 1995, p. 518.

<sup>276</sup> *Ibid.*

### 5.3.4 Assumption 3: interdependence and the international system

Moravcsik also argued that “the behavior of States – and hence levels of international conflict and cooperation – reflect the nature and configuration of State preferences.”<sup>277</sup> Liberalism analyzes international relations in terms of the patterns of divergent State preferences (inter-State conflict) and convergent state preferences (inter-State cooperation), which in turn reflect the social context of a state.<sup>278</sup> Moravcsik claimed: “what States do is determined by what they want”<sup>279</sup> and this is fundamentally different from realists who would argue that “what States do is determined by what they can get.”<sup>280</sup> Realists will claim that power will determine the outcomes of coercion, bargaining, negotiation and other forms of inter-State strategic interaction and institutionalist will claim that it is power as conditioned by institutionalized practices.<sup>281</sup> Liberals will claim that State preferences themselves are the key determinant of inter-State bargaining outcomes.<sup>282</sup> How much the State is willing to concede to obtain a particular preference is determined by the nature, strength and intensity of that preference, which in turn will determine its bargaining success.<sup>283</sup> Of course, not every State simply pursues its ideal policy. Each State seeks to realize its preferences under varying constraints imposed by the preferences of other States.<sup>284</sup> However, the liberalism approach implies that inter-State politics are more complex than realists and institutionalists assume and acknowledge, because States are not unitary actors and “domestic preferences vary widely and change unpredictably.”<sup>285</sup> Moravcsik pointed out that the most important contribution of liberalism to IR theory lies in the “specification of the social conditions that determine variations in the underlying level of conflict and convergence between the preferences of States.”<sup>286</sup> Liberalists argue that ends, not means, matter the most. Although liberalism is a comprehensive theory of the international system and applies to all States, it takes explicitly domestic regime-type into account when analyzing State behavior. The theory permits a distinction among different types of States based on their domestic political structure and ideology.<sup>287</sup>

<sup>277</sup> A. Moravcsik, *Liberalism and International Relations Theory*, Center for International Affairs, Harvard University, Working Paper, 1992, p. 10.

<sup>278</sup> *Ibid.*, p. 10-11.

<sup>279</sup> *Ibid.*, p. 11.

<sup>280</sup> *Ibid.*

<sup>281</sup> A. Slaughter, International Law and International Relations Theory: A Dual Agenda, *The American Journal of International Law*, Volume 87, No. 2, 1992, p. 228.

<sup>282</sup> A. Moravcsik, *Liberalism and International Relations Theory*, Center for International Affairs, Harvard University, Working Paper, 1992, p. 13.

<sup>283</sup> A. Slaughter, International Law and International Relations Theory: A Dual Agenda, *The American Journal of International Law*, Volume 87, No. 2, 1992, p. 228.

<sup>284</sup> A. Moravcsik, Taking Preferences Seriously: A Liberal Theory of International Politics, *International Organization*, Volume 51, No. 4, 1997, p. 520.

<sup>285</sup> K.W. Abbott, International Relations Theory, International Law, and the Regime Governing Atrocities in International Conflicts, *American Journal of International Law*, Volume 93, 1999, p. 366.

<sup>286</sup> A. Moravcsik, *Liberalism and International Relations Theory*, Center for International Affairs, Harvard University, Working Paper, 1992, p. 12.

<sup>287</sup> A. Slaughter, International Law in a World of Liberal States, *European Journal of International Law*, Volume 6, No. 1, 1995, p. 504.

### 5.3.5 'Democratic Peace'

Doyle and Russett were pioneers on the phenomenon of peace among liberal States. Doyle defined liberal States as "States with some form of representative democracy, a market economy based on private property rights, and constitutional protections of civil and political rights."<sup>288</sup> Democratic peace scholars argue that liberal democracies are less likely to go to war with other democracies. Levy claimed that the "absence of war between democracies comes as close as anything we have to an empirical law in international relations."<sup>289</sup> The democratic peace scholars do not claim that liberal States are more peaceful by nature than authoritarian or other non-democratic States, but they claim that liberal States (or "democratically organized political systems")<sup>290</sup> are more peaceful in their dealings with each other and have fewer conflicts among themselves.<sup>291</sup> When liberal democracies come into conflict with each other, they hardly ever threaten to use force, because that would be "illegitimate" to do so.<sup>292</sup> The empirical claim for democratic peace is still a great dispute in political science. Mainly realist scholars deny the existence of democratic peace and have declared democratic peace "a fantasy."<sup>293</sup>

### 5.3.6 Compliance with international law

The claim for democratic peace was the foundation for liberalists to develop a theory on compliance with international law. Although liberalism focused initially more on international politics than on international law, Slaughter brought the liberalist approach to the attention of legal scholars.<sup>294</sup> She is the most prominent advocate of liberalism within the legal academy and argued that "lawyers have long recognized differences between sovereign States, but they have lacked any means of bridging the gap between legal fiction and political reality."<sup>295</sup> In line with the democratic peace literature, she claimed – together with Moravcsik – not so much that democracies do not go into war with each other, but rather, that democracies are more inclined to "do law"

<sup>288</sup> M.W. Doyle, Kant, Liberal Legacies, and Foreign Affairs, *Philosophy and Public Affairs*, Volume 12, No. 3, 1983, p. 205.

<sup>289</sup> J.S. Levy, *Domestic Politics and War*, in: R.I. Rotberg and T.K. Rabb, *The Origin and Prevention of Major Wars*, Cambridge University Press, 1989, p. 88.

<sup>290</sup> B. Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World*, Princeton University Press, 1993, p. 11.

<sup>291</sup> *Ibid.*

<sup>292</sup> M.W. Doyle, Kant, Liberal Legacies, and Foreign Affairs, *Philosophy and Public Affairs*, Volume 12, No. 3, 1983, p. 213; B. Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World*, Princeton University Press, 1995, p. 33.

<sup>293</sup> J.M. Owen, How Liberalism Produces Democratic Peace, *International Security*, Volume 19, No. 2, 1994, p. 119. For realist views on the democratic peace, see J.J. Maearsheimer, Back to the Future, Instability in Europe After the Cold War, *International Security*, Volume 15, No. 1, 1990; K.N. Waltz, The Emerging Structure of International Politics, *International Security*, Volume 18, No. 2, 1993; Christopher Layne, Kant or Cant: The Myth of the Democratic Peace, *International Security*, Volume 19, No. 2, 1994; H.S. Farber and J. Gowa, Politics and Peace, *International Security*, Volume 20, No. 2, 1995.

<sup>294</sup> O.A. Hathaway, Do Human Rights Treaties Make a Difference?, *Yale Law Journal*, Volume 112, 2002, p. 1953.

<sup>295</sup> A. Burley, Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine, *Columbia Law Review*, Volume 92, p. 1996.



with each other.<sup>296</sup> She argued that compliance with international law is determined in significant part by the domestic structure of a country. Her hypothesis is that liberal States tend to comply more with international commitments (including international and supranational legal judgments) than non-liberal States,<sup>297</sup> mainly because domestic interest groups will put pressure on liberal States to comply with their international legal obligations. More specifically, Slaughter and Helfer argued that “government institutions committed to both the rule of law and separation of powers [...] in systems where the individuals themselves are ultimately sovereign, are primed to be the most receptive to the tools that a supranational tribunal has at its disposal.”<sup>298</sup> Also in the field of human rights, liberalists assume that liberal States are more likely to comply with the human rights framework. They argue that human rights treaties will be more effective in changing behaviour in liberal States than in non-liberal States. The reason is that domestic interest groups use the legal obligations following from human rights treaty ratifications in order to put pressure on domestic political institutions to take action in conformance with the human rights treaty. In Hathaway’s words: “compliance with international law comes, in the liberalist view, from the favourable effect of international law and legal institutions on domestic interests – a phenomenon not limited to, but more likely to be found in, liberal States.”<sup>299</sup> Unsurprisingly, many liberal scholars focus on European Union law, noting that the European system of human rights works, because the European Union is largely composed of liberal democratic States, who share reasons for collective obedience. As Koh pointed out, this might help to explain why “the embryonic African human rights system – a collection of democracies and authoritarian regimes – does not work nearly as well.”<sup>300</sup>

### 5.3.7 Concluding observations

The development of a liberal theoretical framework, mainly done by Moravcsik, challenged the dominance of realism (and institutionalism). Slaughter concluded in one of her articles that “not one, but two powerful responses now exist within political science, responses that recognize the importance and relevance of international law under specified conditions.”<sup>301</sup> Liberalists argue that State preferences are determined by domestic politics and the theory rests on three liberal core assumptions (i) the key actors are not States, but individuals and privately-constituted groups, (ii) States are representatives, (iii)

<sup>296</sup> H.H. Koh, How is International Human Rights Law Enforced?, *Indiana Law Journal*, Volume 74, 1999, p. 1404.

<sup>297</sup> Traditional international law scholars, such as Henkin, similarly argued: “In general, Western-style democracies have tended to observe international law more than do others.” See L. Henkin, *How Nations Behave: Law and Foreign Policy*, Columbia University Press, 1979, p. 63.

<sup>298</sup> L.R. Helfer, and A. Slaughter, Toward a Theory of Effective Supranational Adjudication, *Yale Law Journal*, Volume 107, 1997, p. 334.

<sup>299</sup> O.A. Hathaway, Do Human Rights Treaties Make a Difference?, *Yale Law Journal*, Volume 112, 2002, p. 1953.

<sup>300</sup> H.H. Koh, How is International Human Rights Law Enforced?, *Indiana Law Journal*, Volume 74, 1999, p. 1404.

<sup>301</sup> A. Slaughter, International Law and International Relations Theory: A Dual Agenda, *The American Journal of International Law*, Volume 87, No. 2, 1993, p. 238.

inter-State behaviour reflects the pattern of State preferences.<sup>302</sup> In line with the democratic peace literature, a liberal theory regarding compliance with international human rights law has been developed. Liberalists argue that liberal States are more likely to comply with the human rights framework, because domestic interest groups put pressure on governments to take action.

## 5.4 Constructivism

Constructivism is another approach that emerged in the 1990s as a challenge to the dominant realist theoretical paradigms. It has become one of the major schools of thought within IR. As is the case with institutionalism, constructivism is not (yet) a single theory, but “a family of theories”<sup>303</sup> that includes postmodernists such as Ashley,<sup>304</sup> constructivists such as Kratochwil<sup>305</sup> and Ruggie,<sup>306</sup> neo-Marxists such as Cox,<sup>307</sup> and feminists such as Peterson.<sup>308</sup> As a result, there are many forms of constructivism.<sup>309</sup> However, they all share the view that neorealism and neoliberalism are “undersocialized.”<sup>310</sup> Contrary to the assumptions of (neo)realism, constructivists seek to demonstrate how international politics and the international system are “socially constructed.”<sup>311</sup> Wendt is the best-known advocate of social constructivism. In his article *Constructing International Politics*,<sup>312</sup> he laid out the basic assumptions of constructivism. Wendt made two basic claims: “The fundamental structures of international politics are social rather than strictly material (a claim that opposes materialism)”<sup>313</sup> and “These structures shape actors’ identities and interests, rather than just their behaviour (a claim that opposes rationalism).”<sup>314</sup> Wendt opened the way for IR scholars to engage in a wide range of issues from a constructivist perspective.

### 5.4.1 Similarities between realism and constructivism

Although constructivism challenges some of the basic realist assumptions, both schools also share some assumptions about the nature of the international

<sup>302</sup> A. Moravcsik, *Liberalism and International Relations Theory*, Center for International Affairs, Harvard University, Working Paper, 1992, p. 16.

<sup>303</sup> A. Wendt, *Constructing International Politics*, *International Security*, Volume 20, No. 1, 1995, p. 71.

<sup>304</sup> R.K. Ashley, *The Poverty of Neorealism*, *International Organization*, Volume 38, No. 2, 1984, p. 225-286.

<sup>305</sup> F.V. Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, Cambridge University Press, 1991.

<sup>306</sup> J.G. Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, *International Organization*, Volume 52, No. 4, 1998, p. 855-885.

<sup>307</sup> R. Cox, *Production, Power, and World Order*, Columbia University Press, 1987.

<sup>308</sup> V.S. Peterson, *Gendered States: Feminist (Re)visions of International Relations Theory*, Lynne Rienner Pub, 1992.

<sup>309</sup> A. Wendt, *Social Theory of International Politics*, Cambridge University Press, 1999, p. 1.

<sup>310</sup> *Ibid.*, p.4.

<sup>311</sup> A. Wendt, *Constructing International Politics*, *International Security*, Volume 20, No. 1, 1995, p. 71.

<sup>312</sup> *Ibid.*, p. 71.

<sup>313</sup> *Ibid.*, p. 71-72.

<sup>314</sup> *Ibid.*

system.<sup>315</sup> They both believe for example that States are the dominant actors in the international system and both assume that States behave essentially as unitary actors.<sup>316</sup> In addition, both IR schools believe that international politics is anarchic,<sup>317</sup> that States have offensive capabilities, that States wish to survive and that States cannot be hundred percent sure about other States' intentions.<sup>318</sup> According to Wendt, another assumption constructivists share with realists is "the importance of systemic or "third image" theorizing."<sup>319</sup> In other words, both IR schools share the assumption that it is important to theorize about the international system for an understanding of IR.<sup>320</sup>

#### 5.4.2 Distinguishing characteristics of constructivism

Constructivists make two divergent assumptions in comparison with realists about the nature of international politics. Wendt's first main rejection to realism is that it is not structural enough: "adopting the individualistic metaphors of micro-economics restricts the effects of structures to State behaviour, ignoring how they might also constitute State identities and interest."<sup>321</sup> Constructivists and realists differ in their assumptions about what structure (anarchy and the distribution of power)<sup>322</sup> is made of. Realists argue that structure is made of a distribution of material capabilities, whereas constructivists argue that the structure is "social" and made of social relationships. According to Wendt, "social structures" have three elements: "shared knowledge, material resources, and practices."<sup>323</sup> He explains that these three elements are "real and objective," not "just talk."<sup>324</sup>

The second rejection of Wendt to realism is founded in its conception of State identity and interests. As opposed to realists and institutionalists, who argue that the identity and interests of States are exogenously determined), constructivists argue: "interests and identities of States are created and evolve through interaction with the international system."<sup>325</sup> In other words, States help constitute the structure of the international system through their interactions with each other, and the international structure in turn shapes the identities and interests of States. This "mutually constitutive" relationship between the actor and the structure leads to the conclusion that the

<sup>315</sup> A.C. Arend, Do Legal Rules Matter? International Law and International Politics, *Virginia Journal of International Law*, Volume 38, 1997/1998, p. 126.

<sup>316</sup> *Ibid.*

<sup>317</sup> However, constructivists render anarchy in cultural rather than materialist terms.

<sup>318</sup> A. Wendt, Constructing International Politics, *International Security*, Volume 20, No. 1, 1995, p. 72.

<sup>319</sup> *Ibid.*

<sup>320</sup> A.C. Arend, Do Legal Rules Matter? International Law and International Politics, *Virginia Journal of International Law*, Volume 38, 1997/1998, p. 126-127.

<sup>321</sup> A. Wendt, Constructing International Politics, *International Security*, Volume 20, No. 1, 1995, p. 72.

<sup>322</sup> A. Wendt, Anarchy is what States Make of it: The Social Construction of Power Politics, *International Organization*, Volume 46, No. 2, 1992, p. 391.

<sup>323</sup> A. Wendt, Constructing International Politics, *International Security*, Volume 20, No. 1, 1995, p. 72-73.

<sup>324</sup> *Ibid.*, p. 74.

<sup>325</sup> A.C. Arend, Do Legal Rules Matter? International Law and International Politics, *Virginia Journal of International Law*, Volume 38, 1997/1998, p. 128.

participation in institutional arrangements can “alter the identity and, therefore, the interests of States.”<sup>326</sup>

#### 5.4.3 Compliance with international law

Constructivists refer much more to international law compared to the other three previously discussed IR theories. Constructivists contend that the international system is a social structure and international legal rules are part of this structure.<sup>327</sup> Kocs explains that these legal rules are “a set of underlying, implicit rules which create a framework that allows formal agreements between States to be meaningful and binding.”<sup>328</sup> Consequently, constructivists assert that international laws are socially constructed. Furthermore, participation in the international regime and the existence of international law may change the identity of a State, and accordingly, the interest of a State: “States may have a particular identity at any given time but as States develop new rules of international law – either through treaty or custom – their participation in the legal regime may alter that original identity.”<sup>329</sup> Thus, international actors and their interests are not fully formed, but can change when States interact with each other. International law is therefore able to change State action by changing the preferences or interests of States, because they are socially constructed.<sup>330</sup>

Constructivism differs fundamentally from realism, institutionalism and liberalism (that all have rationalist accounts), because they reject the notion that the pursuit of self-interest alone can explain the behaviour of States.<sup>331</sup> Instead, constructivists have a normative interest in promoting social change. Constructivists focus attention upon the roles of culture, ideas, institutions and discourse. They stressed the role norms play in framing social interaction and encouraging a “shared understanding.”<sup>332</sup> These social norms (rather than power and interest balances) shape – according to constructivists – the identity and behaviour of States and can generate voluntary compliance (when particular legitimacy requirements are met).<sup>333</sup> In other words, States internalize international laws and behave in accordance with international law because States find these laws correct or appropriate.<sup>334</sup>

<sup>326</sup> A.C. Arend, Do Legal Rules Matter? International Law and International Politics, *Virginia Journal of International Law*, Volume 38, 1997/1998, p. 129.

<sup>327</sup> S.A. Kocs, Explaining the Strategic Behaviour of States: International Law as a System Structure, *International Studies Quarterly*, Volume 38, No. 4, 1994, p. 535-556.

<sup>328</sup> *Ibid*, p. 538.

<sup>329</sup> A.C. Arend, Do Legal Rules Matter? International Law and International Politics, *Virginia Journal of International Law*, Volume 38, 1997/1998, p. 132.

<sup>330</sup> M. Finnemore, *National Interests in International Society*, Cornell University Press, 1996, p. 5.

<sup>331</sup> O.A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, Yale Law School Faculty Scholarship Series, Paper 836, 2005, p. 481, available at <http://www.lawschool.cornell.edu/cornell-IL-IR/upload/O-Hathaway-Between-Power-and-Principle-An-Integrated-Theory-of-International-Law-2.pdf> [Last Accessed 1 October 2015].

<sup>332</sup> M. Finnemore and K. Sikkink, International Norm Dynamics and Political Change, *International Organization*, Volume 52, No. 4, 1998, p. 887.

<sup>333</sup> U. Beyerlin et al., *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia*, Brill, 2006, p. 9.

<sup>334</sup> O.A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, Yale Law School Faculty Scholarship Series, Paper 836, 2005, p. 481, available at

#### 5.4.4 Concluding observations

Although constructivists share many assumptions with realists, they do not agree with the realist conclusion that international law is epiphenomenal and that States comply with international law coincidentally or when it is in their own interest. Compliance is neither a result of rational calculations of how compliance or noncompliance will affect their interests or impose constraints. Compliance with international law is instead a matter of internalized identities and norms of appropriate behaviour. Constructivists demonstrate in their theory the significance of international law in the international political arena and come to the conclusion that international law matters.<sup>335</sup> Constructivism is most probably the most compelling IR theory for IL scholars. Arend also argues that constructivism provides a theoretical framework “for explaining what many international legal scholars take for granted.”<sup>336</sup> Constructivists draw on the normative power of rules and the importance of shared knowledge and discourse in shaping identity and interests.<sup>337</sup> Scholars, such as Finnemore,<sup>338</sup> have begun to provide empirical support for constructivism.

## 6 NEW GENERATION OF INTERDISCIPLINARY SCHOLARSHIP

### 6.1 International Legal Compliance

For much of the 20<sup>th</sup> century, a clear gap existed between IL and IR theory on compliance. In fact, the two disciplines worked independently on the ‘compliance question’ and developed their own theories explaining why States comply with international law “along parallel, but rarely intersecting paths.”<sup>339</sup> However, this changed in the late 1990s, when there was an increased interest to bridge the gap between the two fields. As Slaughter noted in 1998: “understanding the sister discipline will enrich international lawyers’ practical and intellectual work, from doctrinal analysis and policy prescriptions to international legal theory.”<sup>340</sup> This resulted in a growing enthusiasm for interdisciplinary collaboration among members of both disciplines when addressing the ‘compliance question’. Slaughter argued: “many international lawyers and international relations scholars are speaking the same language, or at least languages. They may not yet be speaking with one voice, nor should

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<http://www.lawschool.cornell.edu/cornell-IL-IR/upload/O-Hathaway-Between-Power-and-Principle-An-Integrated-Theory-of-International-Law-2.pdf> [Last Accessed 1 October 2015].

<sup>335</sup> A.C. Arend, *Do Legal Rules Matter?* *International Law and International Politics, Virginia Journal of International Law*, Volume 38, 1997/1998, p. 153.

<sup>336</sup> *Ibid*, p. 134.

<sup>337</sup> K. Raustriala and A. Slaughter, *International Law, International Relations and Compliance*, in: W. Carlsnaes et al., *Handbook of International Relations*, London, Sage Publications, 2012, p. 540.

<sup>338</sup> M. Finnemore, *International Organizations as Teachers of Norms: The United Nations Education Scientific, and Cultural Organization and Science Policy*, *International Organization*, Volume 47, No. 4, 1993, p. 565.

<sup>339</sup> J. Dunoff and M.A. Pollack, *What Can International Relations Learn From International Law?*, Paper presented at the University of California, 29 May 2014, p. 1, available at [http://iicas.ucsd.edu/\\_files/papers/pia/Pollack-paper.pdf](http://iicas.ucsd.edu/_files/papers/pia/Pollack-paper.pdf) [Last Accessed 1 October 2015].

<sup>340</sup> A. Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, *The American Journal of International Law*, Volume 92, No. 3, 1998, p. 373.

they be. But each side is finding something to say, in a deepening and mutually profitable conversation.”<sup>341</sup>

Since then, political scientists and international lawyers no longer ignored each other's insights. IL and IR theorists were increasingly talking to one another and started to read and draw on one another's work with increasing frequency.<sup>342</sup> IL and IR scholars started to move towards each other by using materials from each other's discipline. More specifically, IL scholars were drawing on IR paradigms to refine their analyses and IR theorists were looking to IL scholarship for insights into the structure of international law.<sup>343</sup> Both disciplines have “rediscovered” one another and made substantive contributions to both the IR and IL literature.<sup>344</sup> In addition, methodologies from the social sciences were used in the analysis of the ‘compliance question’.<sup>345</sup> As a result, the rather strict ‘legal’ or ‘IR’ views on compliance started to disappear.

This new generation of interdisciplinary scholarship has been referred to by Bradford as the joint sub-discipline of ‘International Legal Compliance’ (ILC), which is, according to him, the “newest and most rapidly developing subfield in international law.”<sup>346</sup> He suggested that ILC is in the middle of the two traditional IL and IR disciplines and might become a similar concept as law & economics in the (near) future.<sup>347</sup> However, at this moment, ILC is still referred to as a “primitive science”<sup>348</sup> that is according to some scholars “underdeveloped”, “fragmented” and “unfocused”.<sup>349</sup> Although a true joint discipline has not yet emerged, intellectual influence between the two disciplines has been taking place and remarkable interdisciplinary progress has been made in the past years.<sup>350</sup>

<sup>341</sup> A. Slaughter et al., International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship, *The American Journal of International Law*, Volume 92, No. 3, 1998, p. 393.

<sup>342</sup> *Ibid.*, p. 367.

<sup>343</sup> K. Raustriala and A. Slaughter, *International Law, International Relations and Compliance*, in: W. Carlsnaes et al., *Handbook of International Relations*, London, Sage Publications, 2012, p. 544.

<sup>344</sup> A. Slaughter et al., International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship, *The American Journal of International Law*, Volume 92, No. 3, 1998, p. 393; J. Dunoff and M.A. Pollack, *What Can International Relations Learn From International Law?*, Paper presented at the University of California, 29 May 2014, p. 77, available at [http://iicas.ucsd.edu/\\_files/papers/pia/Pollack-paper.pdf](http://iicas.ucsd.edu/_files/papers/pia/Pollack-paper.pdf) [Last Accessed 1 October 2015].

<sup>345</sup> L. Hoder, *Is There a Theory of International Legal Compliance?*, ECPR Graduate Conference, Dublin, Ireland, 2010, p. 3, available at <http://www.ecprnet.eu/databases/conferences/papers/598.pdf> [Last Accessed 1 October 2015].

<sup>346</sup> W.C. Bradford, *International Legal Compliance: An Annotated Bibliography*, *North Carolina Journal of International Law and Commercial Regulation*, Volume 30, No. 2, 2004, p. 1.

<sup>347</sup> K.W. Abbott, *Toward a Richer Institutionalism for International Law and Policy*, *Journal of International Law & International Relations*, Volume 8, 2005, p. 9.

<sup>348</sup> W.C. Bradford, *In the Minds of Men: A Theory of Compliance with the Laws of War*, *Arizona State Law Journal*, Volume 37, 2005, p. 2.

<sup>349</sup> L. Hoder, *Is there a Theory of International Legal Compliance?*, Paper for the ECPR Graduate Conference 2010, Panel International Norms: Recent Developments in a Growing Debate, Dublin, Ireland, 31 august 2010, p. 3-5.

<sup>350</sup> K.W. Abbott, *Toward a Richer Institutionalism for International Law and Policy*, *Journal of International Law & International Relations*, Volume 8, 2005, p. 9.

## 6.2 Advancing traditional International Law and International Relations theories

Within this period of change where new interdisciplinary scholarship is growing and subfields are emerging, the “old orthodoxies”<sup>351</sup> described in section 4 and 5 are facing challenges. In the new millennium, scholars from different disciplines raised fundamental questions about the way traditional IL and IR scholars studied international law and the conclusions they reached about compliance with international law. A new generation of IL and IR scholars have advanced the traditional IL and IR theories and shared distinct perspectives on international law in general and the human rights framework in particular. As a result, alternative compliance theories have been developed that shed new light on the ‘compliance question’.

### 6.2.1 Guzman’s reputational theory

Guzman is an IL scholar who developed, in his own words, a “better” and “more realistic” theory of compliance with international law.<sup>352</sup> In his theory, he explains how State behaviour is influenced by international law. Unlike traditional IL scholarship, Guzman used in his theory a model of rational, self-interested States. He argues that: “States are unitary actors engaged in the pursuit of national goals.”<sup>353</sup> With a rational-actor model, he explains that a State’s decision to comply with international law reflects a judgment that the costs of violation outweigh the benefits.<sup>354</sup> In other words, he perceives compliance as a result of cost-benefit calculations. According to Guzman, reputation plays a central role in this compliance ‘calculation’, as well as direct sanctions: “along with the possibility of direct sanctions, reputation provides an incentive for States to comply with their obligations.”<sup>355</sup> The greater the costs incurred by loss of reputation or sanctions for violating international law, the greater the propensity of States to comply with international law. He also argues that reciprocity can serve as a powerful compliance-enhancing tool.<sup>356</sup> Guzman’s compliance theory is based on the institutionalist tradition of IR,<sup>357</sup> but also aims to compliment liberal theory.<sup>358</sup> He explicitly rejects some of the notions of Franck and Koh: “States do not concern themselves with the welfare of other States but instead seek to maximize their own gains or payoffs. States, therefore, have no innate preference for complying with international law, they are unaffected by the ‘legitimacy’ of a rule of law (Franck 1995), past consent to a rule is insufficient to ensure compliance, and there is no assumption that

<sup>351</sup> K. Raustiala, Refining the Limits of International Law, *Georgia Journal of International and Comparative Law*, Volume 34, 2006, p.1.

<sup>352</sup> A.T. Guzman, A Compliance-Based Theory of International Law, *California Law Review*, Volume 90, 2002, p. 1827 and p. 1887.

<sup>353</sup> *Ibid*, p. 1840.

<sup>354</sup> *Ibid*, p. 1853.

<sup>355</sup> *Ibid*, p. 1886.

<sup>356</sup> A.T. Guzman, *How International Law Works: A Rational Choice Theory*, Oxford University Press, 2008, p. 42.

<sup>357</sup> A.T. Guzman, A Compliance-Based Theory of International Law, *California Law Review*, Volume 90, 2002, p. 1827 and p. 1840.

<sup>358</sup> *Ibid*.

decision-makers have internalized a norm of compliance with international law (Koh 1997)."<sup>359</sup> By using a repeated-game model of State behaviour, Guzman comes to the conclusion that States generally comply with international law (although he recognizes that international law is violated in some instances). Guzman explicitly says that he does not agree with many realists who consider international law simply an epiphenomenon. At the same time, he argues that IL scholars should keep the limits of international law in mind.

#### 6.2.2 Downs, Rocke & Barsoom's enforcement theory

IR scholars Downs and colleagues are the authors of the so-called 'enforcement theory' (also referred to as 'political economy theory').<sup>360</sup> Their theory is closely linked to institutionalism and placed in direct opposition of the managerial theory of Chayes & Chayes. In their theory on international law compliance, Downs and colleagues first elaborated on the weaknesses of the managerial school (including selection problems and endogeneity), after which they presented their own sanction-oriented theory. They emphasized the strategic dimensions of cooperation and explained that it is useful to think of a treaty's "depth of cooperation" as the extent to which the treaty requires States to depart from what they would have done in its absence. The "depth of cooperation" is the figure that – according to Downs and colleagues – serves as the basis for judging the level of compliance.<sup>361</sup> They argue that there is a connection between the "depth of cooperation" and the amount of enforcement needed to generate compliance.<sup>362</sup> Unlike Chayes & Chayes who argue that sanctions are never required or appropriate to ensure compliance, Downs and colleagues argue that sanctions are needed when strong incentives exist for non-compliance. This is especially the case when international law requires States to depart significantly from what they would have done in the absence of the treaty.<sup>363</sup> However, when there is little "deep cooperation" it is likely that there is no or little need for enforcement.<sup>364</sup> Downs *et al.* concluded therefore that enforcement plays a significant role in relation to compliance with international law.

#### 6.2.3 Goldsmith & Posner's limit theory

In their book *The Limits of International Law*,<sup>365</sup> Goldsmith and Posner offer, in their own words, a "new" and "comprehensive" theory of international law, because they aim to explain how international law works by integrating it with

<sup>359</sup> A.T. Guzman, *How International Law Works: A Rational Choice Theory*, Oxford University Press, 2008, p. 17.

<sup>360</sup> A. Slaughter, International Law in a World of Liberal States, *European Journal of International Law*, Volume 6, No. 1, 1995, p. 543.

<sup>361</sup> G.W. Downs et al., Is the Good News about Compliance Good News about Cooperation?, *International Organization*, Volume 50, No. 3, 1996, p. 383.

<sup>362</sup> *Ibid.*, p. 387-388.

<sup>363</sup> J. Brunnée, *Enforcement Mechanisms in International Law and International Environmental Law*, in: U. Beyerlin et al., *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue Between Practitioners and Academia*, Brill, 2006, p. 11.

<sup>364</sup> G.W. Downs et al., Is the Good News about Compliance Good News about Cooperation?, *International Organization*, Volume 50, No. 3, 1996, p. 388.

<sup>365</sup> J.L. Goldsmith and E.A. Posner, *The Limits of International Law*, Oxford University Press, 2005.



the realities of international politics. Although they are both IL scholars, their approach is closer to the traditional IR tradition, and in particular to institutionalism (and although they distinguish their approach from realism, there are quite some overlaps with this theory as well).<sup>366</sup> They argue that IL scholars exaggerated the normative power and significance of international law.<sup>367</sup> Goldsmith and Posner criticized Franck's legitimacy theory and Koh's transnational legal process theory for their assumption that States comply with international law for non-instrumental reasons. They argue that "the best explanation for when and why States comply with international law is not that States have internalized international law, or have a habit of complying with it, or are drawn by its moral pull, but simply that States act out of self-interest."<sup>368</sup> Similar to Guzman, they reject the norm-based methods of international law, or more specifically "the traditional explanations of international law based on legality, morality, *opinio juris*, and related non-instrumental concepts."<sup>369</sup> They use a State-centred rational-choice model to explain when and why States comply with international law.<sup>370</sup> They place the State at the centre of analysis and their theory implies that international law emerges from States that act rationally to maximize their interests, given their perceptions of the interests of other States and the distribution of State power.<sup>371</sup> Goldsmith and Posner identified four factors explaining State behaviour. These are (i) coincidence of interest; (ii) coordination; (iii) cooperation; and (iv) coercion.<sup>372</sup> Both authors reach the conclusion that international law matters, but that there are limits to what international law can achieve, because States follow international law only when it is in their interest to do so.

#### 6.2.4 Risse, Ropp and Sikkink's spiral model

In 1999, Risse, Ropp and Sikkink wrote the book *The Power of Human Rights* in which they proposed a five-stage 'spiral model' of human rights change to explain how human rights regimes are internalized and implemented domestically, ultimately changing the behaviour of States.<sup>373</sup> Their approach is largely drawn on constructivism.<sup>374</sup> The five stages of their "socialization process" of human rights norms are: (i) repression and activation of network; (ii) denial of human rights violations; (iii) tactical concessions; (iv) prescriptive status, including the ratification of international human rights treaties and their incorporation into domestic law and institutions; (v) rule-consistent behaviour.<sup>375</sup> They argue that: "norms influence political change through a

<sup>366</sup> J.L. Goldsmith and E.A. Posner, *The Limits of International Law*, Oxford University Press, 2005, p. 16.

<sup>367</sup> *Ibid*, p. 225.

<sup>368</sup> *Ibid*, p. 225.

<sup>369</sup> J.L. Goldsmith and E.A. Posner, *The New International Law Scholarship*, *Georgia Journal of International and Comparative Law*, Volume 34, 2006, p. 463.

<sup>370</sup> J.L. Goldsmith and E.A. Posner, *The Limits of International Law*, Oxford University Press, 2005, p. 4.

<sup>371</sup> *Ibid*, p. 3.

<sup>372</sup> *Ibid*, p. 11-13.

<sup>373</sup> T. Risse et al., *The Power of Human Rights: International Norms and Domestic Change*, Cambridge University Press, 1999, p. 3.

<sup>374</sup> *Ibid*, p. 8, 236.

<sup>375</sup> *Ibid*, p. 32.

socialization process that combines instrumental interests, material pressures, argumentation, persuasion, institutionalization and habitualization.”<sup>376</sup> The model shows the important role of domestic opposition groups in mobilizing and effectuating change.<sup>377</sup> In a later version of their spiral model, they integrated some elements of rational choice into their constructivist perspective, mainly because recent quantitative research showed some lacunas in their model.<sup>378</sup> They argue that – in addition to the factors mentioned in their original ‘spiral model’ – institutional (in)capacity might influence compliance with human rights norms.<sup>379</sup>

#### 6.2.5 Goodman & Jinks’ State socialization theory

IL professors Goodman and Jinks offered an alternative theory on international law compliance, while – like Risse and colleagues – focusing specifically on human rights law. Their aim is to “improve the understanding of how norms operate in international society with a view to improving the capacity of global and domestic institutions to harness the process through which human rights cultures are built.”<sup>380</sup> Building on the work of Koh and constructivist compliance theory, they provide a conceptual framework focusing on a social process through which State behaviour is influenced, which they call “acculturation.”<sup>381</sup> Goodman and Jinks argue that prevailing approaches solely focused on “coercion” or “persuasion”, which are indeed factors that influence the behaviour of States according to Goodman and Jinks, but that a third mechanism what they call “acculturation” is neglected. The two authors argue that “acculturation” is key to understand how international law might change State behaviour.<sup>382</sup> They define “acculturation” as follows: “the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture.”<sup>383</sup> This mechanism induces behavioural changes through “pressures to assimilate—some imposed by other actors and some imposed by the self.”<sup>384</sup> To a certain extent, this “acculturation” is similar to what Koh calls “habitual obedience.” Goodman & Jinks’ State socialization theory builds on sociological (and psychological) approaches and challenges some elements of rational choice theories.<sup>385</sup>

<sup>376</sup> IT. Risse et al., *The Power of Human Rights: International Norms and Domestic Change*, Cambridge University Press, 1999, p. 37.

<sup>377</sup> *Ibid.*, p. 22.

<sup>378</sup> E.S. Bates, Sophisticated Constructivism in Human Rights Compliance Theory, *The European Journal of International Law*, Volume 25, No. 4, 2015, p. 1171.

<sup>379</sup> *Ibid.*, p. 1171.

<sup>380</sup> R. Goodman and D. Jinks, How to Influence States: Socialization and International Human Rights Law, *Duke Law Journal*, Volume 54, 2004, p. 2.

<sup>381</sup> R. Goodman and D. Jinks, Toward an Institutional Theory of Sovereignty, *Stanford Law Review*, Volume 55, 2003, p. 1749.

<sup>382</sup> R. Goodman and D. Jinks, How to Influence States: Socialization and International Human Rights Law, *Duke Law Journal*, Volume 54, 2004, p. 4.

<sup>383</sup> *Ibid.*, p. 5.

<sup>384</sup> *Ibid.*, p. 13.

<sup>385</sup> E.S. Bates, Sophisticated Constructivism in Human Rights Compliance Theory, *The European Journal of International Law*, Volume 25, No. 4, 2015, p. 1173.

### 6.2.6 Brunnée & Toope's interactional theory

IL professors Brunnée and Toope argued in *Legitimacy and Legality in International Law: An Interactional Account*<sup>386</sup> that their interactional theory of compliance is primarily a theory of obligation.<sup>387</sup> They explain that they do not deny that rationalist accounts of compliance have explanatory power, but at the same time they argue: “purely rationalist accounts miss an important part of the compliance picture precisely because they discount obligation.”<sup>388</sup> Both authors are in favour of the “cooperative, problem-solving approach” to promote compliance, a Chayesian argument.<sup>389</sup> Drawing on Chayes & Chayes managerial theory, Franck's legitimacy theory, Koh's transnational legal process theory, Goodman & Jinks State socialization theory and constructivism, the two authors argue: “norms shape the identities and actions of States and other international actors.”<sup>390</sup> Brunnée and Toope explain that “interactionalism” reveals that the power of international law “rests in a conscious sense of obligation rooted in a specific form of legal legitimacy.”<sup>391</sup> They argue that international law's obligatory power (or its self-binding effect) must be maintained.<sup>392</sup> Important in that regard is the law-making stage, because the creation of obligations presupposes transparent and inclusive processes in order to be legitimate. Treaties need to represent genuinely shared understandings and need to be “reasonable and predictable in their implications for parties.”<sup>393</sup> Their theory is not limited to State actors, but both authors explain how diverse actors can interact through law.

### 6.2.7 Moore's signaling theory

IL scholar Moore starts his article *A Signaling Theory of Human Rights Compliance*<sup>394</sup> with references to existing compliance theories. He mentions the theories of Henkin, Chayes & Chayes, Koh as well as the theory of Goldsmith & Posner. He explains that “none of these approaches, however, offers a comprehensive description of compliance with international law in general or human rights law in particular.”<sup>395</sup> He explains the shortcomings of these theories and concludes that all these theories fail “to take adequate note of a significant dynamic that affects human rights compliance: signalling.”<sup>396</sup> Moore argues that his “signaling theory” is an important addition to the developing scholarship on compliance with international law. The “signaling theory” of Moore supplements the rational choice perspective (more specifically

<sup>386</sup> J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law: An Interactional Account*, Cambridge University Press, 2010, p. 91.

<sup>387</sup> *Ibid.*, p. 91, 124.

<sup>388</sup> *Ibid.*, p. 91-92.

<sup>389</sup> *Ibid.*, p. 109.

<sup>390</sup> *Ibid.*, p. 92.

<sup>391</sup> *Ibid.*, p. 97.

<sup>392</sup> *Ibid.*, p. 98.

<sup>393</sup> *Ibid.*, p. 99.

<sup>394</sup> D.H. Moore, *A Signaling Theory of Human Rights Compliance*, *Northwestern University Law Review*, Volume 97, No. 2, 2003.

<sup>395</sup> *Ibid.*, p. 880.

<sup>396</sup> *Ibid.*, p. 881.

reputational theories) on compliance.<sup>397</sup> He defines a “signal” as “a costly behaviour that can communicate information about the sender when the receiver knows that only senders with a particular characteristic can afford, or are willing, to send the signal.”<sup>398</sup> In other words: States enter human rights treaties because States want to signal particular messages to other States. These messages include a State’s willingness to restrain the exercise of power in the medium-term for benefits in the long-term.<sup>399</sup> Compliance with the human rights framework is costly, thus can serve as a signal. He provides a cost-benefit analysis that explains the decisions of States to comply or not with human rights principles, emphasizing the role of reputation in the decision to comply with human rights treaties.

### 6.3 Combination of factors

When analyzing these new compliance theories more in depth, one can see that these new theories are largely in consistence with the considerable body of existing work of IL and IR scholars. Recent scholarship on compliance theory draws on, and is often a derivative of, the traditional IL and IR theories described in sections 4 and 5. Most scholars who developed these “new” theories criticized and/or praised one or more traditional IL and IR theories, explained what previous theories have overlooked, took several elements of different theories and thus constructed their own new theory on compliance with international law. Guzman’s reputational theory, Goldsmith & Posner’s limit theory and Downs enforcement theory provide a new twist on the institutionalist theory, by incorporating for example elements from realism (Goldsmith & Posner), incorporating elements from liberalism (Guzman) or by placing the theory in direct opposition of the managerial theory (Downs). Goodman & Jinks’ State socialization theory is grounded both in constructivism as well as in Koh’s transnational legal process theory. What follows from the analysis in section 6.2 is that the rational choice perspective on compliance is becoming very popular, not only among IR scholars, but also among IL scholars. Other scholars also noted that this game-theoretical approach has gained much prominence in the more recent compliance literature dealing with international law.<sup>400</sup> Another insight that follows from the analysis in section 6.2 is that – although all these new theories enrich traditional theories with insights and elements from other schools, offer interesting insights and make fascinating combinations of elements of traditional theories – it is important to note that these scholars do not mention many new factors that explain compliance with international law in general and the human rights framework in particular. Only the factor “acculturation” (following from the State socialization theory of Goodman & Jinks’) and the factor “signaling” (following from the signaling

<sup>397</sup> D.H. Moore, A Signaling Theory of Human Rights Compliance, *Northwestern University Law Review*, Volume 97, No. 2, 2003, p. 881.

<sup>398</sup> *Ibid.*, p. 882.

<sup>399</sup> J.P. Trachtman, *The Future of International Law: Global Government*, Cambridge University Press 2013, p. 130-131.

<sup>400</sup> A. van Aaken, To Do Away with International Law? Some Limits to ‘The Limits of International Law’, *European Journal of International Law*, Volume 17, No. 1, 2006, p. 289.

theory of Moore) were not mentioned in the traditional IL and IR theories. All the other factors following from the seven new theories explaining compliance with international law in general and the human rights framework in particular, were not new.

## 7 CONCLUSION

### 7.1 Contradictory premises

More than three decades ago, Henkin's famous claim "*it is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time*"<sup>401</sup> set the stage for new compliance scholarship in the end of the 1970s. Since then, both IL and IR scholars have developed a wide variety of theories, in an effort to explain State compliance with international law.

This chapter showed that IL and IR theories are often based on contradictory premises. In general, IL scholars argue that States are guided by legal rules. Guzman wrote more than one decade ago the following: "Despite the fundamental importance of the compliance in question, however, the legal academy has failed to develop a satisfactory theory to explain it."<sup>402</sup> He argues that traditional international legal scholars *believe* or have *faith* that international law matters, but they have failed to develop a coherent theory regarding compliance with international law. They have built their theories on an assumption of a general propensity of States to comply with international law. These assumptions are probably rooted in predominant positivism of the traditional IL discipline, "leading many international lawyers to see obligation as nothing more than the legal consequence of formal validity, or State consent."<sup>403</sup> IR scholars are far more sceptical. They assume the ample opposite and have pessimistic expectations on the role of international law to change behaviour of States. The IR approach toward State compliance with international law challenged, often fundamentally, the theories developed by the traditional IL scholars.<sup>404</sup> The presuppositions, research agenda, methods and terminology of IR were different compared to IL. The IR approach came primarily from political science, but also has its roots in economics literature. In general, IR scholars have an aversion to the legalistic and normative approach towards compliance. IR scholars depart from a different "ideology" and their thoughts on compliance with international law are very different compared to IL scholars. IR scholars have often regarded international law as "something of an epiphenomenon, with rules of international law being dependent on power,

<sup>401</sup> L. Henkin, *How Nations Behave: Law and Foreign Policy*, New York, Columbia University Press, 2<sup>nd</sup> edition, 1979, p. 47.

<sup>402</sup> A.T. Guzman, A Compliance-Based Theory of International Law, *California Law Review*, Volume 90, 2002, p. 1830.

<sup>403</sup> J. Brunnée and S. Toope, *Legitimacy and Legality in International Law: An Interactional Account*, Cambridge University Press, 2010, p. 89.

<sup>404</sup> L.R. Helfer, Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes, *Columbia Law Review*, Volume 102, 2002, p. 1835.

subject to short-term alteration by power-applying States, and therefore of little relevance to how States actually behave.”<sup>405</sup> In general, they argue that international law has little or no impact on the behaviour of States.

## 7.2 Bridging the gap between International Law and International Relations

Initially, both IL and IR theorists worked independently on the issue of compliance. The advances made by each discipline in theorizing compliance were ignored by the other discipline.<sup>406</sup> As Abbott explained: “The agenda, methods and terminology of IR differ significantly from traditional legal approaches, creating a “two cultures” problem.”<sup>407</sup> However, the chasm between the two disciplines has narrowed as IL and IR theorists have begun to share insights in the late 1990s. International lawyers and political scientists started to talk to each other, read each other’s work, drew on each other’s insights and started to cooperate with much greater frequency. In the past decade, research agendas in IL and IR have converged around the ‘compliance question’.<sup>408</sup> As Alkoby explains: “International lawyers turn to IR theory for better explanatory models for the evolution of norms and for compliance with them, while IR scholars turn to theories on law for normative models in order to better understand observed behavioural regularities.”<sup>409</sup> A new generation of interdisciplinary scholarship has emerged, referred to as the sub-discipline of ‘International Legal Compliance’ that stands in the middle of the two traditional IL and IR disciplines.

In this period of new interdisciplinary scholarship, alternative theories in relation to the ‘compliance question’ have been developed. However, when analyzing this ‘new generation’ of compliance theories more in depth, one can conclude that these are not really new theories, but actually traditional IL and IR theories that were ‘enriched’ with insights of other theories. These new theories do not mention many new factors that explain compliance with international law in general and the human rights framework in particular, but rather combine elements of different theories.

## 7.3 Interest-based versus norm-based theories

Research on the ‘compliance question’ encompasses nowadays a wide range of theories in the disciplines of law and political science. There are many different views and factors explaining what a State leads to act in compliance or in violation with international law in general and the human rights framework in

<sup>405</sup> M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law*, Cambridge University Press, 1999, p. 8.

<sup>406</sup> O.A. Hathaway, Do Human Rights Treaties Make a Difference? *Yale Law Journal*, Volume 112, 2002, p. 1942-1943.

<sup>407</sup> K.W. Abbott, International Relations Theory, International Law, and the Regime Governing Atrocities in International Conflicts, *American Journal of International Law*, Volume 93, 1999, p. 365.

<sup>408</sup> J. Von Stein, *The Engines of Compliance*, in: J.L. Dunoff and M.A. Pollack, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, Cambridge University Press, 2012, p. 500.

<sup>409</sup> A. Alkoby, Theories of Compliance with International Law and the Challenge of Cultural Difference, *Journal of International Law & International Relations*, Volume 4, No. 1, 2008, p. 154.

particular. When describing all these theories, it seems that there is a lack of coherence. However, after careful examination of all these theories, a difference could be established between two groups of theories: (i) theories based on interest; (ii) and theories based on norms.<sup>410</sup>

Interest-based theories are mostly utilitarian. These theories often regard States as rational, self-interested actors that calculate costs and benefits in an anarchic international system. These theories often claim that States comply with international law (if they see international law as having any effect at all) for example because of material self-interest, the fear for punishment and sanctions, or reputational concerns. The action of States that follow the interest-based approach is also referred to as following the “logic of (expected) consequences.”

Norm-based theories focus more on the role of identities, the normative power of rules, the persuasive power of ideas and the influence of shared discourse and knowledge on States’ interests. Accordingly, norm-based theories suggest a more cooperative approach to obtaining compliance. These theories claim that States comply with international law because of the commitment itself and the norms that States feel obliged by. They share the assumption that law has the potential to shape the conduct of States or other international actors. The action of States following the norm-based approach is also referred to as following the “logic of appropriateness.”

Although one has to take into account that the two “logics” are not always mutually exclusive<sup>411</sup> and that the lines between the two “logics” is not always sharp, it provides a useful starting point for further analysis.<sup>412</sup> Table 2.1 provides an overview of all the compliance theories that have been analysed in this literature review and their classification as following the “logic of consequences” or the “logic of appropriateness.”<sup>413</sup>

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<sup>410</sup> See also J.G. March and J.P. Olsen, *The Institutional Dynamics of International Political Orders*, *International Organization*, Volume 52, 1998, p. 943-969. See also: O.A. Hathaway, *Do Human Rights Treaties Make a Difference?* *Yale Law Journal*, Volume 112, 2002, p. 1935-1936; L. Hoder, *Is there a Theory of International Legal Compliance?*, Paper for the ECPR Graduate Conference 2010, Panel International Norms: Recent Developments in a Growing Debate, Dublin, Ireland, 31 august 2010, p. 3; J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law: An Interactional Account*, Cambridge University Press, 2010, p. 91-92.

<sup>411</sup> J.G. March and J.P. Olsen, *The Institutional Dynamics of International Political Orders*, *International Organization*, Volume 52, 1998, p. 952.

<sup>412</sup> D. Zaelke et al., *Making Law Work: Environmental Compliance & Sustainable Development*, Cameron May, 2005, p. 55.

<sup>413</sup> L. Hoder, *Is there a Theory of International Legal Compliance?*, Paper for the ECPR Graduate Conference 2010, Panel International Norms: Recent Developments in a Growing Debate, Dublin, Ireland, 31 august 2010, p. 23.

**Table 2.1 Interest-based and norm-based theories**

Compliance Theory	Interest-Based	Norm-Based
Henkin's compliance theory		✓
Chayes and Chayes' managerial theory		✓
Frank's legitimacy theory		✓
Koh's transnational legal process theory		✓
Realism	✓	
Institutionalism	✓	
Liberalism <sup>414</sup>	✓	
Constructivism		✓
Guzman's reputational theory	✓	
Downs, Rocke & Barsoom's enforcement theory	✓	
Goldsmith & Posner's limit theory	✓	
Risse, Ropp & Sikkink's spiral model <sup>415</sup>		✓
Goodman & Jinks' State socialization theory		✓
Brunnée & Toope's interactional theory		✓
Moore's signaling theory	✓	

#### 7.4 Factors explaining compliance

IL and IR scholarship has tended to treat the different compliance theories as mutually exclusive and competitive. However, this chapter has shown that international lawyers and political scientists often use the same factors in their theories explaining compliance and non-compliance. In that sense, the disciplines of IL and IR are inevitable inter-linked. Table 2.2 below provides an overview of the factors that follow from IL and IR theories that explain compliance and non-compliance with international law in general and the human rights framework in particular.

<sup>414</sup> Liberalism is largely an interest-based model, but discards the assumption that states are unitary actors.

<sup>415</sup> The Spiral Model is largely a norm-based model, but the recent adjustments of Risse & Sikkink to their model (to include more rational choice elements) made their model move towards an interest-based theory.



Table 2.2 Factors explaining compliance and non-compliance

Compliance	Non-Compliance
Self-interest	Self-interest
Legitimacy and fairness	Legitimacy and fairness
Transparent treaty language	Ambiguity in treaty language
Reputation	Lack of national capacity
Power and coercion	Lack of deterrence
Punishment and sanctions	Pressure of influential parties
Political personalities	Inadequate legal advice
<i>Pacta sunt servanda</i>	Outdated treaty norms
Reduce transaction costs	Failing treaty negotiation process
Symbolic validation, ritual and pedigree	Time lag between commitment and compliance
Coherence	Clash with local customs
Communitarianism	Unauthorized act
Internalization of rules	
Pressure of domestic interest groups	
Imitation of others	
Signaling	
Acculturation	
Reciprocity	

As explained in the introduction of this thesis, more empirical testing of the compliance theories has recently been taking place. Despite the progress made in the past years, the current empirical evidence on compliance and non-compliance with international law and the human rights framework in particular is still rather thin and a long way from being settled. In Chapter VI, this theoretical framework will be subjected to empirical analysis in order to evaluate whether the factors described in IL and IR theories correspond with reality, in the context of the practice of FGM/C in Senegal.

## **PART II**

### **HUMAN RIGHTS FRAMEWORK**



## CHAPTER III

# THE PRACTICE OF FEMALE GENITAL MUTILATION/CUTTING

*"I feel that God made my body perfect the way I was born. [...] If God had wanted those body parts missing, why did he create them? I just pray that one day no woman will have to experience this pain. It will become a thing of the past. [...] What a happy day that will be, and that's what I'm working toward. In'shallah, if God is willing, it will happen."*

Waris Dirie<sup>1</sup>

### 1 INTRODUCTION

Before the factors described in the previous chapter are empirically tested, more background information on the practice of FGM/C is presented in this chapter. The aim for this chapter is to enhance understanding of what the practice of FGM/C entails in order to establish a link between the practice and the human rights that are being violated. For many people, the practice of FGM/C seems incomprehensible. Gruenbaum expressed this as follows: "To outsiders, the practice euphemistically known as "female circumcision" is shocking. That people surgically alter the genitals of young girls and women, usually in painful unhygienic procedures that can cause grave harm to their health, seems truly horrible. Why do loving parents allow such things to happen? How can they bring themselves to celebrate these events? How can they justify the practice when occasionally a girl dies from the injuries?"<sup>2</sup> In Western cultures, FGM/C is often viewed as a horrific act of cruelty, born from gender inequality, perpetrated on young girls under barbaric conditions.<sup>3</sup> However, the practice is far more complex than this. FGM/C occurs in a wide variety of cultural contexts. Many parents see the practice as a necessary act of love, because it "purifies" the girl and brings her status: "Cutting one's daughter is critical to her future, ensuring that she will be a respected member of her community and preparing her to find a good husband in cultures where marriage is essential for a girl's economic security and social acceptance. To not cut one's daughter

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<sup>1</sup> W. Dirie, *Desert Flower: The Extraordinary Journey of a Desert Nomad*, William Morrow Paperbacks, 1998, p. 238.

<sup>2</sup> E. Gruenbaum, *The Female Circumcision Controversy: An Anthropological Perspective*, University of Pennsylvania Press, 2001, p. 1.

<sup>3</sup> A. Molloy, *However Long the Night: Molly Melching's Journey to Help Millions of African Women and Girls Triumph*, Harper Collins Publishers, 2013, p. x.

would be unthinkable – setting her up for a lifetime of rejection and social isolation.”<sup>4</sup> This chapter will further explain why this deeply rooted tradition has met with the approval of communities for thousands of years. By means of a literature review, the following research question will be addressed: “*What does the practice of Female Genital Mutilation/Cutting entail?*”

The structure of this chapter is as follows. The first two sections provide the definition and terminology of the practice of FGM/C. Section 4 spells out the history and the origins of the practice and section 5 elaborates on the documentation and data collection of the practice. Statistics in relation to the worldwide prevalence are provided in section 6. Details about how the procedure is performed, including the age at FGM/C, the practitioners, setting and materials used and the type of FGM/C performed are given in section 7. The health consequences are elaborated upon in section 8 and the justifications for the practice in section 9. Section 10 addresses the ‘social convention theory’ and explains how FGM/C could be considered a social norm in certain communities. Concluding observations can be found in section 11.

## 2 DEFINITION

The WHO, UNICEF and UNFPA issued in 1997 a Joint Statement on FGM/C in which they provided the following definition of the practice: “Female genital mutilation comprises all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs whether for cultural or other non-therapeutic reasons.”<sup>5</sup> This definition was slightly modified in 2008 when ten UN agencies adopted an Inter-agency Statement on FGM/C. They defined the practice as: “all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons.”<sup>6</sup> This definition (“for non-medical reasons”) is now generally accepted as the standard (by the international community, academia, practitioners and activists).<sup>7</sup>

<sup>4</sup> A. Molloy, *However Long the Night: Molly Melching’s Journey to Help Millions of African Women and Girls Triumph*, Harper Collins Publishers, 2013, p. viv.

<sup>5</sup> World Health Organization, *Female Genital Mutilation: A Joint WHO/UNICEF/UNFPA Statement*, WHO Library, 1997, p. 3.

<sup>6</sup> World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008, p. 4. See also World Health Organization, *Female Genital Mutilation*, Fact Sheet No. 241, WHO, February 2014, available at <http://www.who.int/mediacentre/factsheets/fs241/en/> [Last Accessed 1 October 2015].

<sup>7</sup> This definition is also used at the national level in African countries. For example in the second National Action Plan of Senegal, reference is made to the WHO definition: “*L’expression Mutilations Génitales Féminines (MGF) désigne selon l’Organisation Mondiale de la Santé (OMS), “toutes les interventions aboutissant à une ablation totale ou partielle des organes génitaux de la femme et/ou toute autre lésion des organes génitaux féminins pratiquée à des fins non thérapeutiques.”*” (Translation: The term Female Genital Mutilation (FGM) refers according to the World Health Organization (WHO), “all procedures involving partial or total removal of the genitals of women and/or other injury to the female genital organs practiced for non-therapeutic purposes.”) See National Plan of Action to Accelerate the Abandonment of Excision 2010-2015 (Original in French: *Plan d’Action National pour l’Accélération de l’Abandon de l’Excision 2010-2015*), Ministry of the Family, National Solidarity and Female Entrepreneurship, February 2010, p. 7.

3 TERMINOLOGY AND CLASSIFICATION

The WHO recommended a more precise anatomical typology of FGM/C, because a standardized classification would be useful “for purposes such as research on the consequences of different forms of female genital mutilation, estimates of prevalence and trends in change, gynaecological examination and management of health consequences, and for legal cases.”<sup>8</sup> In order to ensure international consistency, the WHO has broken down the various forms of FGM/C into four categories with a standardized typology. The typology developed by the WHO at a technical consultation in 1995 and modified in 2007 can be found in table 3.1.<sup>9</sup>

Table 3.1 Classification of FGM/C

WHO Typology		
I	Clitoridectomy	Partial or total removal of the clitoris (a small, sensitive and erectile part of the female genitals) and, in very rare cases, only the prepuce (the fold of skin surrounding the clitoris).
II	Excision	Partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (the labia are "the lips" that surround the vagina).
III	Infibulation	Narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the inner, or outer, labia, with or without removal of the clitoris.
IV	Other	All other harmful procedures to the female genitalia for non-medical purposes, for example pricking, piercing, incising, scraping and cauterizing the genital area.

4 ORIGIN AND HISTORICAL ASPECT OF FGM/C

Unfortunately, no one has been able to identify the origin of FGM/C with any accuracy. The roots and spread of the practice remain highly unknown. There is no strong evidence documenting when, how or why this practice began. However, it is believed that the origin of the practice predates the rise of Christianity and Islam and was occurring some 5.000 years ago.<sup>10</sup> There is some evidence that the practice has arisen in the Nuba region (now known as Egypt and northern Sudan) in the Nile valley and then spread by dominant ethnic

<sup>8</sup> World Health Organization, *Female Genital Mutilation, Report of a WHO Technical Working Group*, WHO, Geneva, 17-19 July 1996.  
<sup>9</sup> World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008, p. 24.  
<sup>10</sup> World Health Organization, *Female Genital Mutilation, New Knowledge Spurs Optimism*, Progress in Sexual and Reproductive Health Research, No. 72, 2006, p.3, available at [http://www.who.int/reproductivehealth/topics/fgm/progress72\\_fgm.pdf](http://www.who.int/reproductivehealth/topics/fgm/progress72_fgm.pdf) [Last Accessed 11 October 2015].

groups to Northeast and West Africa “often as a result of tribal, ethnic, and cultural allegiances.”<sup>11</sup> Ancient Egyptian mummies have been described displaying characteristics of FGM/C, and it is thought that FGM/C may have been a mark of distinction amongst the ruling class.<sup>12</sup> In other groups it appears to have been a mark of enslavement and subjugation.<sup>13</sup>

Historically, the first reference to FGM/C appears in the writings of the Greek historian Herodotus (484-424 B.C.). He reported the existence of FGM/C in ancient Egypt<sup>14</sup> and had the following observations: “They are religious beyond measure, more than any other people; and the following are among their customs. They drink from cups of bronze, which they clean out daily; this is done not by some, but by all. They are especially careful always to wear newly washed linen. They circumcise their privy parts for cleanliness’ sake; for they would rather be clean than more becoming.”<sup>15</sup> The Histories of Herodotus reveal that the Colchians, Ethiopians, Phoenicians and the Syrians of Palestine performed both male circumcision and FGM/C.<sup>16</sup> FGM/C also appears in the writings by the Greek geographer and historian Strabo (64 B.C.-23), who visited Egypt. He reported in 25 B.C. that FGM/C was a tradition along the East Coast of the Red Sea.<sup>17</sup> More specifically, Strabo wrote in his work *Geographica*: “One of the customs most zealously observed among the Egyptians is this, that they rear every child that is born, and circumcise the males, and excise the females as is also customary among the Jews, who are also Egyptians in origin.”<sup>18</sup> A Greek papyrus dated 163 B.C. explicitly mentioned FGM/C being performed on girls in Memphis, Egypt, at the age when they received their dowries.<sup>19</sup>

There are also various reports on the practice of FGM/C by a number of 18th century travellers, who observed its performance on slave girls by slave traders along the Nile.<sup>20</sup> Niebuhr, a German traveller who was part of a European scientific expedition, visited Egypt in 1767 and he reported that FGM/C was common on slave girls.<sup>21</sup>

However, different theories about the origins of the practice exist. Some scholars argue that FGM/C had a number of different origins: “The origin of

<sup>11</sup> N. Toubia, *Female Genital Mutilation, A Call for Global Action*, RAINBO publications, 1995, p. 21.

<sup>12</sup> A. Worsley, Infibulation and Female Circumcision: A Study of a Little-Known Custom, *Journal of Obstetrics and Gynaecology of British Empire*, Volume 45, 1938, p. 686-691.

<sup>13</sup> H. Lightfoot-Klein, *Prisoners of Ritual: An Odyssey into Female Circumcision in Africa*, Harrington Park, 1989, p. 28.

<sup>14</sup> S. Joseph and A. Nağmābādī, *Encyclopedia of Women & Islamic Cultures: Family, Body, Sexuality and Health*, Volume 3, Brill Academic Publishers, 2005, p. 129.

<sup>15</sup> S.R. Huebner, Female Circumcision as a Rite of Passage in Egypt: Continuity Through the Millennia?, *Journal of Egyptian History*, Volume 2, 2009, p. 156.

<sup>16</sup> World Health Organization, *Traditional Practices Affecting the Health of Women and Children*, WHO/EMRO Technical Publication No. 2, Report of a Seminar, Khartoum, 10-15 February 1979, p. 43-52.

<sup>17</sup> F. Hosken, *The Hosken Report: Genital and Sexual Mutilation of Females*, Women’s International Network News, Lexington, MA, 1994, p. 73.

<sup>18</sup> J. Tyldesley, *Daughters of Isis: Women of Ancient Egypt*, Penguin UK, 1995.

<sup>19</sup> S.R. Huebner, Female Circumcision as a Rite of Passage in Egypt: Continuity Through the Millennia?, *Journal of Egyptian History*, Volume 2, 2009, p. 164.

<sup>20</sup> C.C. Widstrand, Female Infibulation, *Studia Ethnographica Upsaliensia*, Volume 20, 1965, p. 95-124.

<sup>21</sup> L.J. Kouba, and J. Muasher, Female Circumcision in Africa: An Overview, *African Studies Review*, Volume 28, No. 1, 1985, p. 95-110.

female circumcision is rooted too distantly in human history to be fruitfully traced. The ritual has always been so widespread that it cannot have arisen from a single origin.”<sup>22</sup> Along the same lines, Abusharaf explains that the ascription of the practice to ancient Egypt remains highly controversial in historical scholarship.<sup>23</sup>

## 5 COLLECTION OF DATA ON FGM/C

The practice of FGM/C started to become more documented in the early 20<sup>th</sup> century in reports of European travellers and missionaries. Furthermore, in the late 1950s, 1960s and 1970s, small clinical studies by physicians, hospital records, and direct interviews with patients in a few countries provided additional evidence for the existence of FGM/C. However, the practice did not attract the attention of many trained scholars until the late 1970s.<sup>24</sup>

### 5.1 The Hosken Report

In 1979, Francis Hosken published the famous *Hosken Report: Genital and Sexual Mutilation of Females*,<sup>25</sup> which was the first major comprehensive publication on FGM/C in Africa. The first edition of the report<sup>26</sup> presented a global review and country estimates of the prevalence of FGM/C in many African countries, on a country-by-country basis. It marked the beginning of international attention for the practice that had been previously unknown in the Western world, since it was written at a time when large-scale, nationally representative survey data were not generally available. At the same time Hosken has been criticized because of her style and (feminist) approach towards the practice.<sup>27</sup> Since Hosken did not specify the exact methodology by which the data were collected, some scholars argue that the report was based on “questionable sources, many of which were anecdotal.”<sup>28</sup>

### 5.2 DHS and MICS Surveys

The literature on FGM/C was for a long time dominated by “personal accounts of tragic events, small-scale studies of circumcision in a town or a set of villages,

<sup>22</sup> H.M. Harthout, Some Aspects of Female Circumcision, *International Journal of Obstetrics & Gynaecology*, Volume 70, No. 3, 1963, p. 505.

<sup>23</sup> R.M. Abusharaf, *Female Circumcision: Multicultural Perspectives*, University of Pennsylvania Press, 2013, p. 2.

<sup>24</sup> P.S. Yoder and S. Wang, *Female Genital Cutting: The Interpretation of Recent DHS Data*, DHS Comparative Reports No. 33, Calverton, September 2013, p. ix.

<sup>25</sup> F. Hosken, *The Hosken Report: Genital and Sexual Mutilation of Females*, Women’s International Network News, Lexington, MA, 1994.

<sup>26</sup> A literature review by Nahid Toubia published in 1993 called ‘Female Genital Mutilation: A Call for Global Action’ modified Hosken’s figures on the basis of more recent country studies and reports. These figures were updated again in 1995 and 1996.

<sup>27</sup> R.M. Abusharaf, *Revisiting Feminist Discourses on Infibulation: Responses from Sudanese Feminists*, in: B. Shell-Duncan and Y. Hernlund, *Female “Circumcision” in Africa: Culture, Controversy and Change*, Lynne Rienner Publishers, 2000, p. 160-164.

<sup>28</sup> P.S. Yoder and S. Khan, *Number of Women Circumcised in Africa: The Production of a Total*, DHS Working Papers, No. 39, USAID, Calverton, March 2008, p. 2.



and studies of medical complications of circumcised women delivering in a hospital.”<sup>29</sup> This changed in the 1990s, when questions about FGM/C were included in population-based surveys. Nowadays, nationally representative data on FGM/C are mainly available from two sources: Demographic and Health Surveys (DHS) and Multiple Indicator Cluster Surveys (MICS).<sup>30</sup>

Since its initiation in 1984, the DHS project has assisted developing countries worldwide to conduct nationally representative<sup>31</sup> household- surveys on a wide range of topics related to population, health and nutrition.<sup>32</sup> DHS Surveys have large sample sizes (usually between 5.000 and 30.000 households) and are conducted about every five years, to allow comparisons over time.<sup>33</sup> The core questionnaire for women includes topics covering demographic characteristics, fertility, family planning, maternal and child health and nutrition, and HIV/AIDS prevalence, knowledge, attitudes and behaviour. In addition to the core questionnaire for women, optional modules with questions on several topics (including FGM/C, but also malaria, women’s status, maternal mortality, gender/domestic violence) are available for countries to use as well.<sup>34</sup> Up to today, the DHS has conducted over 300 surveys in over 90 countries.<sup>35</sup> The surveys are conducted with technical support from ICF International (formerly Macro International).

Reliable estimates of FGM/C prevalence were not available before the inclusion of questions about the practice of FGM/C in the DHS surveys.<sup>36</sup> An “FGM/C module” was developed in 1989 and female respondents in northern Sudan were for the first time asked questions about FGM/C in the 1989-1990 survey. In this survey, women of reproductive age (15-49 years old) were asked questions about their own FGM/C status, what type of FGM/C they underwent, who performed the practice as well as their opinion about the practice.<sup>37</sup> These questions about FGM/C were in the early 1990s standardized for use in the DHS surveys. Since 1995, countries are able to request the inclusion of the “FGM/C module” to the DHS Women’s Questionnaire if

<sup>29</sup> P.S. Yoder and S. Khan, *Number of Women Circumcised in Africa: The Production of a Total*, DHS Working Papers, No. 39, USAID, Calverton, March 2008, p. 3.

<sup>30</sup> Other nationally representative household surveys with questions on FGM/C include the Family Health Surveys (FHS), conducted by the Pan Arab Project for Family Health (PAPFAM) in Djibouti (2002) and Yemen (2003), the Ethiopian Welfare Monitoring Survey (WMS, 2011) and the Zambia Sexual Behaviours Surveys (ZSBS, 1998-2009).

<sup>31</sup> The DHS is generally representative at the national level, at the residence level (urban-rural) and at the regional level (departments/states).

<sup>32</sup> P.S. Yoder et al., *Female Genital Cutting in the Demographic and Health Surveys: A Critical and Comparative Analysis*, DHS Comparative Reports No 7, Calverton, September 2004, p. 2-3.

<sup>33</sup> See the website of the DHS Program, available at <http://dhsprogram.com/What-We-Do/Survey-Types/DHS.cfm> [Last Accessed 1 October 2015].

<sup>34</sup> P.S. Yoder et al., *Female Genital Cutting in the Demographic and Health Surveys: A Critical and Comparative Analysis*, DHS Comparative Reports No 7, Calverton, September 2004, p. 2.

<sup>35</sup> P.S. Yoder and S. Khan, *Number of Women Circumcised in Africa: The Production of a Total*, DHS Working Papers, No. 39, USAID, Calverton, March 2008, p. 4.

<sup>36</sup> P.S. Yoder and S. Wang, *Female Genital Cutting: The Interpretation of Recent DHS Data*, DHS Comparative Reports No. 33. Calverton, ICF International, September 2013, p. 5.

<sup>37</sup> P.S. Yoder et al., *Female Genital Cutting in the Demographic and Health Surveys: A Critical and Comparative Analysis*, DHS Comparative Reports No 7, Calverton, September 2004, p. 3.

FGM/C is practiced in the country.<sup>38</sup> Nowadays, the FGM/C module focuses on four topics: (i) the FGM/C status of the respondent herself; (ii) details about the cutting (for those respondents who underwent FGM/C); (iii) information about the FGM/C status of one daughter and details about the cutting (in cases where a respondent's daughter underwent FGM/C); (iv) women's and men's personal perceptions and opinions of the practice.<sup>39</sup> To date, the DHS Program has collected data on FGM/C in 23 countries (22 countries in Africa and in Yemen).<sup>40</sup>

The MICS programme is an international household survey developed by UNICEF to support countries in monitoring the situation of children and women. Since 1995, the MICS have been conducted approximately every five years, resulting in more than 200 surveys in about 130 countries.<sup>41</sup> An "FGM/C module" was developed in 2000 and used in selected countries in their MICS from 2005 onwards. The current MICS module of FGM/C is essentially the same as the "FGM/C module" used in the DHS surveys.<sup>42</sup> To date, the MICS has collected data on FGM/C in 16 countries.<sup>43</sup> UNICEF and ICF International worked closely together to harmonize methodologies and indicators used in the surveys and to standardize the survey questions on FGM/C in the DHS and MICS. Both DHS and MICS surveys rely on self-reports and ask respondents if they themselves have been cut for making prevalence estimates.<sup>44</sup> In total, national prevalence data on FGM/C from population-based surveys are now available for 27 countries in Africa as well as Yemen and Iraq. However, in many of these countries, the systematic collection and analysis of data on FGM/C is quite recent.<sup>45</sup>

## 6 PREVALENCE OF FGM/C

### 6.1 Prevalence according to UNICEF

In 2013, UNICEF published a report<sup>46</sup> in which all DHS and MICS data (more than 70 surveys) and other nationally representative datasets with information

<sup>38</sup> P.S. Yoder and S. Wang, *Female Genital Cutting: The Interpretation of Recent DHS Data*, DHS Comparative Reports No. 33, Calverton, September 2013, p. 1.

<sup>39</sup> *Ibid.*, p. 11.

<sup>40</sup> United Nations Children's Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 4.

<sup>41</sup> *Ibid.*

P.S. Yoder and S. Wang, *Female Genital Cutting: The Interpretation of Recent DHS Data*, DHS Comparative Reports No. 33, Calverton, September 2013, p. 14.

<sup>43</sup> United Nations Children's Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 4.

<sup>44</sup> For more information about the DHS survey process in the countries that participate in the DHS Program, see <http://dhsprogram.com/What-We-Do/Survey-Process.cfm> [Last Accessed 1 October 2015]. For more information about the MICS survey process, see:

[http://www.unicef.org/statistics/index\\_24302.html](http://www.unicef.org/statistics/index_24302.html) [Last Accessed 1 October 2015].

<sup>45</sup> United Nations Children's Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 3.

<sup>46</sup> This report expands on a previous publication of UNICEF, namely: United Nations Children's Fund, *Female Genital Mutilation/Cutting: A Statistical Exploration*, UNICEF, New York, November 2005.

on FGM/C were reviewed over a 20-year period. UNICEF claimed that this report “presents the most comprehensive compilation to date of statistics and analyses on FGM/C.”<sup>47</sup> This report covered all 27 countries<sup>48</sup> in Africa and two countries in the Middle East (Yemen and Iraq) where, according to UNICEF, FGM/C is concentrated.<sup>49</sup> UNICEF estimated that 125 million girls and women have been cut in these 29 countries.<sup>50</sup> The report further revealed that 30 million girls are at risk of being cut in the next decade.<sup>51</sup>

Figure 3.1 below provides an overview of the percentage of girls and women (aged 15-49) who underwent FGM/C, by country, as portrayed in the 2013 UNICEF report. The map shows that FGM/C concentrated in those countries that extend from Senegal in the west to Somalia in the east. FGM/C is not prevalent in the northern and southern parts of Africa. With the repeated DHS and MICS surveys, trends on prevalence can be analyzed.<sup>52</sup> A rather mixed picture can be derived from the available data.<sup>53</sup> In some countries, a *downward trend* in prevalence of FGM/C indicates that elimination of FGM/C might be taking place. For example in the Central African Republic, the national prevalence dropped remarkably from 43% in 1994-1995 to 24% in 2010. In Kenya, a considerable reduction in the national prevalence can be observed as well: 38% in 1998 to 27% in 2008-2009. In Sierra Leone, the national prevalence decreased from 94% in 2005 to 88% in 2010. In Egypt, the national prevalence decreased from 97% in 1995 to 91% in 2008. However, in other countries there is *little reduction or no change*. For example, the prevalence has remained constant in Sudan (from 90% in 2000 to 88% in 2010), Gambia (from 78% in 2005-2006 to 76% in 2010), Chad (from 45% in 2000 to 44% in 2010), and in Tanzania (from 18% in 1996 to 15% in 2010). There are also countries where an *increase* in prevalence rate can be observed. For example in Guinea-Bissau, the prevalence of FGM/C increased from 45% in 2006 to 50% in 2010. In Burkina Faso, the national prevalence increased from 72% in 1998-1999 to 76% in 2010.

<sup>47</sup> United Nations Children’s Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 3.

<sup>48</sup> Including Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Côte d’Ivoire, Djibouti, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Togo, Uganda and United Republic of Tanzania.

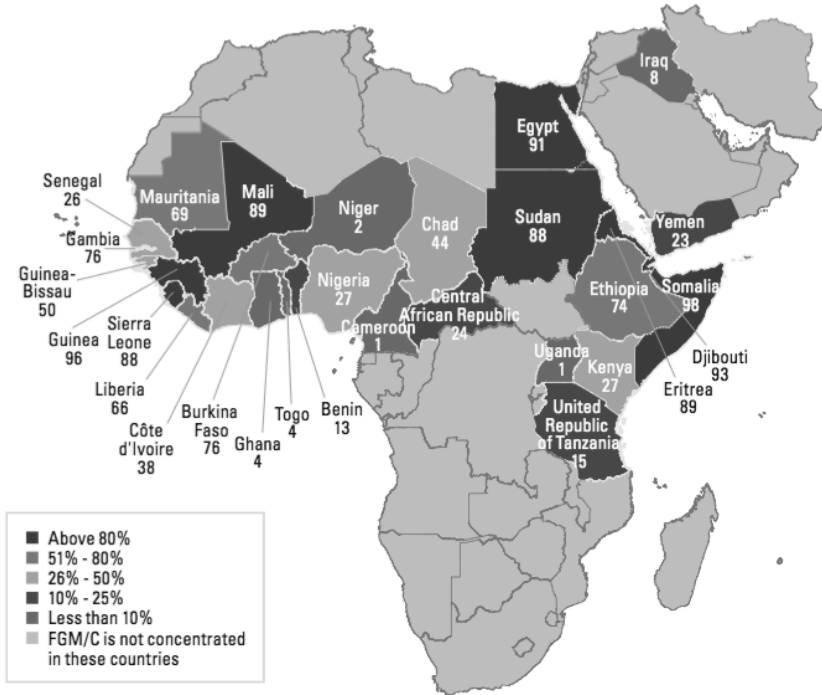
<sup>49</sup> United Nations Children’s Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 3.

<sup>50</sup> *Ibid*, p. 22.

<sup>51</sup> *Ibid*, p. 114; United Nations Children’s Fund, *Female Genital Mutilation/Cutting: What Might the Future Hold?*, UNICEF, July 2014, p. 2.

<sup>52</sup> United Nations Children’s Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 94; P.S. Yoder and S. Wang, *Female Genital Cutting: The Interpretation of Recent DHS Data*, DHS Comparative Reports No. 33, Calverton, September 2013, p.19.

<sup>53</sup> Population Reference Bureau, *Female Genital Mutilation/Cutting: Data and Trends*, Update 2014, available at <http://www.prb.org/pdf14/fgm-wallchart2014.pdf> [Last Accessed 1 October 2015].

**Figure 3.1 Prevalence of FGM/C<sup>54</sup>**

## 6.2 Prevalence in Asia, the Middle East and Latin America

However, map 3.1 of the 2013 UNICEF report does not provide a complete overview of the worldwide FGM/C prevalence. Several Civil Society Organizations (CSOs) working in the field of FGM/C have criticized UNICEF for failing to address other countries where FGM/C is also practiced, especially countries in Asia and the Middle East (except for Yemen and Iraq). For example, the Iraqi-German human rights organization WADI criticizes UNICEF for ignoring the existence of FGM/C in other parts of the world. The association conducted the first comprehensive area-wide research on FGM/C in Iraqi Kurdish provinces. Ever since, WADI made efforts to “uncover the true prevalence of the practice across Iraq, the region, and in other parts of Asia.”<sup>55</sup>

<sup>54</sup> Source: United Nations Children’s Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 26.

<sup>55</sup> See the website of WADI, *One in Four Women in Central and Southern Iraq is Affected by Female Genital Mutilation, New Study Suggests*, available at [http://en.wadi-online.de/index.php?option=com\\_content&view=article&id=1157:one-in-four-women-in-central-and-southern-iraq-is-affected-by-female-genital-mutilation-new-study-suggests&catid=15:presseerklarungen&Itemid=109](http://en.wadi-online.de/index.php?option=com_content&view=article&id=1157:one-in-four-women-in-central-and-southern-iraq-is-affected-by-female-genital-mutilation-new-study-suggests&catid=15:presseerklarungen&Itemid=109) [Last Accessed 1 October 2015].

Since the “FGM/C module” has not been included in the DHS and/or MICS surveys in these countries in Asia and the Middle East (except in Yemen and Iraq), there are no official nationwide statistics available on the existence and prevalence of FGM/C. For that reason, the exact amount of girls and women living with the consequences of FGM/C in this part of the world remains uncertain. However, over the past decade, small-scale local research has increasingly collected evidence, showing that FGM/C is (widely) practiced in Asia and the Middle East. Below, an overview is given of these local studies and the findings about the prevalence of FGM/C in these countries. Since (most of) these studies are small-scale and not nationally representative, the results of these studies need to be interpreted with caution.

### 6.2.1 FGM/C in Asia

In the first place, FGM/C has been documented in Asia. A nation-wide study of the Population Council in 2003 found an extremely high prevalence of FGM/C in Indonesia.<sup>56</sup> The report reveals that FGM/C is almost a universal practice in Indonesia. In most surveyed regions, the prevalence of FGM/C is as high as 100% and the prevalence does not go below 86% in any region.<sup>57</sup> Many girls and women in Malaysia live with the consequences of FGM/C, mostly among the Malay communities.<sup>58</sup> Prevalence estimations in Malaysia range from 62 to 94%.<sup>59</sup> Evidence also suggests that FGM/C is practiced among the Muslim *Darwoodi Bohra* community in India<sup>60</sup> and the *Bohra* and *Sheedi* communities in Pakistan.<sup>61</sup> FGM/C is also reported in Brunei,<sup>62</sup> Maldives<sup>63</sup> Philippines,<sup>64</sup> Singapore,<sup>65</sup> Sri Lanka,<sup>66</sup> Tajikistan<sup>67</sup> and Thailand.<sup>68</sup>

<sup>56</sup> See the website of TaskForce, *Indonesia: Most Girls Suffer Severe Forms of Genital Mutilation*, 25 November 2012, available at <http://www.taskforcefgm.de/en/2012/11/schockierendes-ausmass-schwerer-formen-von-genitalverstummelung-in-indonesien/> [Last Accessed 1 October 2015].

<sup>57</sup> M. Budiharsana et al., *Female Circumcision in Indonesia: Extent, Implications and Possible Interventions to Uphold Women's Health Rights*, Population Council, September 2003, p. 24, available at [http://www.taskforcefgm.de/wp-content/uploads/2012/11/FGM\\_in\\_Indonesien.pdf](http://www.taskforcefgm.de/wp-content/uploads/2012/11/FGM_in_Indonesien.pdf) [Last Accessed 1 October 2015]. See also United States Department of State, *Indonesia: Report on Female Genital Mutilation (FGM) or Female Genital Cutting (FGC)*, 1 June 2001, available at <http://www.refworld.org/docid/46d57879c.html> [Last Accessed 1 October 2015].

<sup>58</sup> See the website of ABC News, *Malaysia Storm over Female Circumcision*, 7 December 2012, available at <http://www.abc.net.au/news/2012-12-07/an-malaysia-debate-over-female-circumcision/4416298> [Last Accessed 1 October 2015].

<sup>59</sup> A.R. Isa et al., *The Practice of Female Genital Mutilation among the Rural Malays in North Malaysia*, *The Internet Journal of Third World Medicine*, Volume 9, Number 1, 2009; I.A. Rahman et al., *The Practice of Female Circumcision among Muslims in Kelantan, Malaysia*, *Reproductive Health Matters*, Volume 7, No. 13, 1999, p. 137–144.

<sup>60</sup> D. Dasgupta, *The Yin, Wounded – The Bohras Female Circumcision*, Outlook India, December 2011, available at <http://www.outlookindia.com/article/The-Yin-Wounded/279088> [Last Accessed 1 October 2015].

<sup>61</sup> See the website of IRIN News, *Pakistan: Low Awareness of Hidden FGM/C Practices*, 26 December 2011, available at <http://www.irinnews.org/report/94534/pakistan-low-awareness-of-hidden-fgm-c-practices> [Last Accessed 1 October 2015].

<sup>62</sup> B.S. Bergawan, *Female Circumcision is Cultural Practice*, The Brunei Times, 16 June 2012, available at <http://www.bt.com.bn/news-national/2012/06/16/female-circumcision-cultural-practice> [Last Accessed 1 October 2015].

<sup>63</sup> H. Amir, *Islamism and Radicalism in the Maldives*, Master Thesis, December 2011, p. 59, available at [http://calhoun.nps.edu/bitstream/handle/10945/10724/11Dec\\_Amir.pdf?sequence=1](http://calhoun.nps.edu/bitstream/handle/10945/10724/11Dec_Amir.pdf?sequence=1) [Last Accessed 1 October 2015]; Haveeru Online, *Attorney General: Practice of Female Circumcision Gaining*

### 6.2.2 FGM/C in the Middle East

In the second place, FGM/C has also been documented in other countries in the Middle East (except Yemen and Iraq). Studies have found prevalence rates between 40 and 85% in Iran.<sup>69</sup> FGM/C is mainly practiced in the western part of the country, namely in West Azerbaijan, Kurdistan and Kermanshah provinces, and some areas of southern Iran, namely the Hormozgan province and its islands.<sup>70</sup> FGM/C is also practiced in Oman<sup>71</sup> and small-scale studies hint that 20% of Omani women and girls are affected.<sup>72</sup> A small-scale survey conducted in the United Arab Emirates showed that 34% of the women underwent FGM/C.<sup>73</sup> In Saudi Arabia, anecdotal evidence exists suggesting that FGM/C is present in the southern part of the country; not among the Saudi population,

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*Momentum in Addu*, 12 December 2009, available at <http://www.haveeru.com.mv/news/28292> [Last Accessed 1 October 2015]; J.J. Robinson, *Reported Increase in Practice of Female Circumcision Raises Alarm*, Minivan News, 30 October 2011, available at <http://minivannews.com/politics/reported-increase-in-practice-of-female-circumcision-raises-alarm-27670> [Last Accessed 1 October 2015].

<sup>64</sup> S.A. Calsalin, *Female Circumcision among Yakan in Basilan, Philippines*, Master Thesis, April 2008, available at <http://aboutphilippines.ph/filer/toledo-cebu/2008-06-25-135433casalin.pdf> [Last Accessed 1 October 2015].

<sup>65</sup> See the website of AWARE Singapore, *AWARE Makes a Stand Against Female Circumcision in Islam*, 19 May 2014, available at <http://rilek1corner.com/2014/05/19/aware-makes-a-stand-against-female-circumcision-in-islam/> [Last Accessed 1 October 2015].

<sup>66</sup> C.A. Jaramillo, *Beyond Comfort*, Standards, Editorial, Volume 7, No. 2, 2001, available at <http://www.colorado.edu/journals/standards/V7N2/EDITORIAL/edfgm.html> [Last Accessed 1 October 2015].

<sup>67</sup> S. Joseph, *Encyclopedia of Women & Islamic Cultures: Family, Body, Sexuality and Health*, Volume 3, Brill Academic Publishers, 2005, p. 588.

<sup>68</sup> C. Merli, *Sunat for Girls in Southern Thailand: Its Relation to Traditional Midwifery, Male Circumcision and Other Obstetrical Practices*, *Finnish Journal Of Ethnicity and Migration*, Volume 3, No. 2, 2008, p. 32-41.

<sup>69</sup> K. Ahmady, *A Comprehensive Research Study on Female Genital Mutilation/Cutting (FGM/C) in Iran – 2015*, available at <http://kameelahmady.com/wp-content/uploads/Kameel%20-%20EN%20Final.pdf> [Last Accessed 1 October 2015]; Südwind, *Violations of Girls' Rights, Child Marriage and FGM in the I.R. Iran*, 2014, available at <http://www.stopfgmmideast.org/wp-content/uploads/2014/07/Iran-FGM-Child-Marriage-2014.pdf> [Last Accessed 1 October 2015]; G. Esfandiari, *Female Genital Mutilation Said To Be Widespread In Iraq's, Iran's Kurdistan*, Radio Free Europe - Radio Liberty, 10 March 2009, available at [http://www.rferl.org/content/Female\\_Genital\\_Mutilation\\_Said\\_To\\_Be\\_Widespread\\_In\\_Iraqs\\_Irans\\_Kurdistan/1507621.html](http://www.rferl.org/content/Female_Genital_Mutilation_Said_To_Be_Widespread_In_Iraqs_Irans_Kurdistan/1507621.html) [Last Accessed 1 October 2015].

<sup>70</sup> K. Ahmady, *A Comprehensive Research Study on Female Genital Mutilation/Cutting (FGM/C) in Iran – 2015*, p. 5, available at <http://kameelahmady.com/wp-content/uploads/Kameel%20-%20EN%20Final.pdf> [Last Accessed 1 October 2015].

<sup>71</sup> K. Ginn, *The Deepest Cut*, Y-Oman, 5 February 2014, available at <https://www.y-oman.com/2014/02/deepest-cut/> [Last Accessed 1 October 2015]; S. Al Sharari, *Female Genital Mutilation (FGM) in Dhofar: The Woman with the Frankincense Burner*, 7 June 2011, available at <http://susanalshahri.blogspot.de/2011/06/woman-with-frankincense-burner.html> [Last Accessed 1 October 2015]; S. Mubarak, *The Issue of Female Genital Mutilation in Oman*, Muscat Daily, 1 January 2013, available at <http://www.muscatdaily.com/Archive/Stories-Files/The-issue-of-female-genital-mutilation-in-Oman-1xye> [Last Accessed 1 October 2015].

<sup>72</sup> See the website of Stop FGM Middle East, *Oman*, available at <http://www.stopfgmmideast.org/countries/oman/> [Last Accessed 1 October 2015].

<sup>73</sup> W. Marzouqi, *Desert Dawn, Fatal Tradition: Female Circumcision in the U.A.E.*, January 2011, available at <http://de.scribd.com/doc/48726435/DesertDawn22-1-January-2011> [Last Accessed 1 October 2015].

but among the immigrant population from Egypt, Somalia and Sudan.<sup>74</sup> FGM/C is also prevalent in Jordan,<sup>75</sup> Bahrain and Qatar.<sup>76</sup> There is also circumstantial evidence suggesting that FGM/C is prevalent in Syria<sup>77</sup> and Kuwait.<sup>78</sup> The practice is also found among Palestinians in Gaza and among the Bedouin tribes and Ethiopian Jewish *Falashas* in Israel.<sup>79</sup>

### 6.2.3 FGM/C in Latin America

Thirdly, scarce incidences of FGM/C have been found in Latin America. FGM/C has been documented among the indigenous *Embera-Chami* community in Colombia.<sup>80</sup> However, little information is available about the practice in this community.

## 6.3 Prevalence in 'the West'

As a result of growing international migration and globalization, FGM/C became a concern in Europe,<sup>81</sup> the United States,<sup>82</sup> Canada,<sup>83</sup> Australia<sup>84</sup> and New Zealand.<sup>85</sup> The exact number of women and girls who have undergone FGM/C or are at risk of undergoing FGM/C in these countries remains unknown. Reliable statistics on the incidence of the practice are not available. According to estimations of the European Parliament, 500,000 girls and women living in Europe have been subjected to FGM/C, while further 180,000 girls and

<sup>74</sup> S.A. Alsibiani et al., *Sexual Function in Women with Female Genital Mutilation, Fertility and Sterility*, Volume 93, No. 3, February 2010, p. 722-724, available at [http://www.kau.edu.sa/Files/140/Researches/50534\\_20747.pdf](http://www.kau.edu.sa/Files/140/Researches/50534_20747.pdf) [Last Accessed 1 October 2015].

<sup>75</sup> R. Sabbagh-Gargour, *The Jordanian Town That Still Circumcises Women*, *The Daily Star*, Libanon, 13 November 2013, available at <http://www.dailystar.com.lb/Culture/Art/2003/Nov-13/111346-the-jordanian-town-that-still-circumcises-women.ashx> [Last Accessed 1 October 2015].

<sup>76</sup> See the website of IRIN news, *In-depth: Razor's Edge - The Controversy of Female Genital Mutilation*, available at <http://www.irinnews.org/indepthmain.aspx?InDepthId=15&ReportId=62465> [Last Accessed 1 October 2015].

<sup>77</sup> See the website of BBC, *Female Circumcision*, available at [http://www.bbc.co.uk/ethics/femalecircumcision/femalecirc\\_1.shtml](http://www.bbc.co.uk/ethics/femalecircumcision/femalecirc_1.shtml) [Last Accessed 1 October 2015].

<sup>78</sup> Ibid.

<sup>79</sup> R. Belmaker, *Female Genital Mutilation: Successful Social Change Exemplified by Israeli Bedouin and Ethiopian Jews*, Ben Gurion University of the Negev, available at <http://www2.kenes.com/wcap/scientific/Documents/Female%20Genital%20Mutilation.pdf> [Last Accessed 1 October 2015].

<sup>80</sup> A. Castellanos, *Colombia Confronts Female Genital Mutilation*, RH Reality Check, Latin America, 18 August 2008, available at <http://rhrealitycheck.org/article/2008/08/18/colombia-confronts-female-genital-mutilation/> [Last Accessed 1 October 2015].

<sup>81</sup> European Institute for Gender Equality, *Female Genital Mutilation in the European Union and Croatia*, EIGE Publications Office, 2013.

<sup>82</sup> L. Westcott, *Female Genital Mutilation on the Rise in the U.S.*, *Newsweek*, 6 February 2015, available at <http://www.newsweek.com/fgm-rates-have-doubled-us-2004-304773> [Last Accessed 1 October 2015].

<sup>83</sup> Ontario Human Rights Commission, *FGM in Canada*, available at <http://www.ohrc.on.ca/en/policy-female-genital-mutilation-fgm/4-fgm-canada> [Last Accessed 1 October 2015].

<sup>84</sup> See the website of No FGM Australia, *FGM In Australia – Fact Sheet*, available at <http://nofgm.org.au/fgm-fact-sheet> [Last Accessed 1 October 2015].

<sup>85</sup> See website of the New Zealand FGM Education Programme, *FGM in New Zealand*, available at <http://fgm.co.nz/fgm-in-nz> [Last Accessed 1 October 2015].

women are at risk every year.<sup>86</sup> However, no sources are provided for that estimation. In the United States, U.S. Centers for Disease Control and Prevention estimated that 168,000 girls in America have undergone or are at imminent risk of undergoing FGM/C.<sup>87</sup> The majority of girls in these Western countries do not undergo the procedure in these countries. Families go with their daughters to their country of origin (often during the summer holidays) to have the procedure performed instead.<sup>88</sup> However, there are some studies reporting that FGM/C takes place in countries in ‘the West’ as well.<sup>89</sup>

#### 6.4 Worldwide prevalence

Taking into account the (small-scale) studies in Asia and the Middle East addressed in section 6.2, growing evidence suggests that the worldwide prevalence of FGM/C is likely to be much higher than 125 million. Several CSOs working on FGM/C have recently changed their maps, highlighting more countries the Middle East and adding Asia (and in some cases also Latin America) where FGM/C is prevalent.<sup>90</sup> Although the WHO and other UN agencies acknowledged in their Joint Statement that FGM/C is not only prevalent in Africa, but also in “some countries in Asia and the Middle East”<sup>91</sup> there is a considerable problem of underreporting in relation to the worldwide prevalence of FGM/C.

If, for example, the data from the nation-wide study in Indonesia is correct, it would mean that Indonesia alone has a potential of over 100 million women and girls who have undergone FGM/C, which are so far not counted UNICEF refers to 125 million. Von der Osten-Sacken, general manager of WADI, said during an interview: “Right now in publications people talk of about 140 to 160 million women who have been genitally mutilated worldwide. But Indonesia – the country with the largest Muslim population in the world – is not included, and it is estimated that about 80 percent of women are circumcised there. If you

<sup>86</sup> European Parliament Resolution on Combating Female Genital Mutilation in the EU, 2008/2071(INI), 24 March 2009, recital B and H.

<sup>87</sup> K. Cullen-DuPont, *Encyclopedia of Women's History in America*, Infobase Publishing, 2009, p. 85.

<sup>88</sup> M. Elgaali et al., Female Genital Mutilation - An Exported Medical Hazard, *European Journal of Contraception and Reproductive Health Care*, Volume 10, No. 2, 2005, p. 93-97.

<sup>89</sup> B. Chalmers and K. Hashi, What Somali Women Say About Giving Birth in Canada, *Journal of Reproductive and Infant Psychology*, Volume 20, 2002, p. 267-281; H. Litorp et al., Female Genital Mutilation Among Antenatal Care and Contraceptive Advice Attendees in Sweden, *Acta Obstetricia et Gynecologica Scandinavica*, Volume 87, No. 7, 2008, p. 716-722; L. Morison et al., How Experiences and Attitudes Relating to Female Circumcision Vary According to Age on Arrival in Britain: A Study Among Young Somalis in London, *Ethnicity & Health*, Volume 9, No. 1, 2004, p. 75-100; C. Thierfelder et al., Female Genital Mutilation in the Context of Migration: Experience of African Women with the Swiss Health Care System, *European Journal of Public Health*, Volume 15, No. 1, 2005, p. 86-90.

<sup>90</sup> See for example the map of the Orchid Project, available at <http://www.stopfgmmideast.org/wp-content/uploads/2015/05/Infographic.pdf> [Last Accessed 1 October 2015].

<sup>91</sup> World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008, p. 1. See also World Health Organization, *Female Genital Mutilation, Fact Sheet No. 241*, WHO, February 2014, available at <http://www.who.int/mediacentre/factsheets/fs241/en/> [Last Accessed 1 October 2015].



add Iraq, Iran, Oman, Yemen and Malaysia, you come to the conclusion that the number of victims of FGM is probably twice as high.”<sup>92</sup>

It seems puzzling that some countries with possible high prevalence rates did not include the “FGM/C Module” to the DHS and/or MICS surveys. What are the reasons behind the lack of FGM/C prevalence data in Asia and the Middle East? Why is the existence of FGM/C in other parts of the world not fully recognized by the international community? Some people argue that the answer may lay in the fear of Islamophobia-phobia. Professor Rouzi from Saudi Arabia argued: “Western agents are afraid to name this connection [between Islam and FGM/C] or come anywhere near it because they are afraid to be called islamophobic.”<sup>93</sup> Along the same lines, Von der Osten-Sacken explained: “In Africa, FGM is practiced by Muslims, Christians and pagans, but east of the Suez Canal FGM seems to occur only amongst Muslim populations. And in general, people are afraid to set off religious discussions. Moreover, the UN can only start an investigation into the widespread occurrence of FGM when a national government is open to this. And the authorities in the Middle East do not want this issue to be discussed publicly. In addition, there is only a limited part of civil society that can criticize FGM.”<sup>94</sup> In order to be able to uncover the true prevalence of the practice of FGM/C across the world, the issues highlighted by Von der Osten-Sacken need to be addressed.

## 7 PERFORMANCE OF FGM/C

### 7.1 Age at FGM/C

FGM/C occurs at all ages, but the procedure is mostly carried out on girls between birth and age of 15 (often in infancy or early childhood).<sup>95</sup> According to UNICEF, in half of the countries with available data on FGM/C, the majority of girls underwent FGM/C before their fifth birthday.<sup>96</sup> In the rest of the countries, most cutting occurs between 5 and 14 years of age.<sup>97</sup> Occasionally, adult women are also subjected to FGM/C (for example a few days before marriage, after marriage, or after their first pregnancy).<sup>98</sup> The age at which girls and women

<sup>92</sup> See the website of Stop FGM Middle East, *Kurdish Villages Declare Themselves FGM-Free*, 13 June 2014, available at <http://www.stopfgmmideast.org/kurdish-villages-declare-themselves-fgm-free/#more-1187> [Last Accessed 1 October 2015].

<sup>93</sup> See the website of WADI, *Second Middle East & Asia Conference on FGM Shows that New Strategies are Needed*, available at [http://en.wadi-online.de/index.php?option=com\\_content&view=article&id=1148:second-middle-east-a-asia-conference-on-fgm-shows-that-new-strategies-are-needed&catid=15:presseerklarungen&Itemid=109](http://en.wadi-online.de/index.php?option=com_content&view=article&id=1148:second-middle-east-a-asia-conference-on-fgm-shows-that-new-strategies-are-needed&catid=15:presseerklarungen&Itemid=109) [Last Accessed 1 October 2015].

<sup>94</sup> See website Stop FGM Middle East, *Kurdish Villages Declare Themselves FGM-Free*, 13 June 2014, available at <http://www.stopfgmmideast.org/kurdish-villages-declare-themselves-fgm-free/#more-1187> [Last Accessed 1 October 2015].

<sup>95</sup> United Nations Children’s Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 7.

<sup>96</sup> *Ibid.*, p. 50.

<sup>97</sup> *Ibid.*, p. ii.

<sup>98</sup> A. Rahman and N. Toubia, *Female Genital Mutilation: A Guide to Laws and Policies Worldwide*, Zed Books, 2000, p. 3.

undergo FGM/C varies substantially from country to country, and even within countries, depending on local traditions and circumstances.<sup>99</sup> For example, at least 80% of cut girls in Somalia, Egypt, Chad and the Central African Republic underwent FGM/C when they were between the ages of 5 and 14, while in countries such as Nigeria, Mali, Eritrea, Ghana and Mauritania, more than 80% of cut girls experienced FGM/C before their fifth birthday. In Guinea-Bissau, about 18% of cut girls underwent FGM/C after age 15, while in Kenya, 46% were not cut until after age 9.<sup>100</sup> However, there are also important differences in the age of cutting in the same country, among different ethnic groups. For example in Kenya, the *Somali* girls undergo FGM/C when they are 9 years old, while the *Kamba* and *Kalenjin* cut girls at the age of 16.<sup>101</sup> In Guinea, 6% of the girls from the *Toma* population were cut before age 5, compared to 39% of girls with a *Malinke* background.<sup>102</sup> The age at cutting has remained fairly stable in most countries, although here is an observable trend for FGM/C to be carried out at younger ages.<sup>103</sup> In some countries, statistical data showed that the average age at which FGM/C is performed is decreasing (the timing of FGM/C shifted from adolescence to early childhood or infancy). For example in Kenya, the proportion of girls and women who underwent FGM/C before age 10 has increased from 14% among women aged 45 to 49 to 44% among girls aged 15 to 19.<sup>104</sup> The same pattern can be observed in Tanzania and in Mali.<sup>105</sup> One commonly cited reason for cutting girls at earlier ages is in the first place that parents believe that it reduces trauma for their girls.<sup>106</sup> In the second place, parents will be able to perform FGM/C more discretely, particularly when they are aware of campaigns aimed at ending FGM/C or where the practice has been criminalized.<sup>107</sup> By cutting younger girls, parents would avoid government's interference and avoid older children to report FGM/C or to denounce parents or cutters to the authorities.<sup>108</sup> It is also commonly believed that young girls heal more quickly than older girls or women, and put up less resistance since they do not fully understand the impact of the practice.<sup>109</sup>

<sup>99</sup> World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008, p. 4.

<sup>100</sup> United Nations Children's Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 47.

<sup>101</sup> *Ibid.*, p. 51.

<sup>102</sup> *Ibid.*

<sup>103</sup> United Nations Children's Fund, *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting*, UNICEF Innocenti Research Centre, 2005, p. 7; United Nations Children's Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 111-112; World Health Organization, *An update on WHO's Work on Female Genital Mutilation (FGM)*, Progress Report, WHO/RHR/11.18, WHO, 2011, p. 2 available at [http://whqlibdoc.who.int/hq/2011/WHO\\_RHR\\_11.18\\_eng.pdf?ua=1](http://whqlibdoc.who.int/hq/2011/WHO_RHR_11.18_eng.pdf?ua=1) [Last Accessed 1 October 2015].

<sup>104</sup> United Nations Children's Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 112.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

## 7.2 FGM/C practitioners

### 7.2.1 Traditional practitioners

The practice of FGM/C is mostly carried out by traditional practitioners,<sup>110</sup> who are generally elderly women specially designated for this task. These women often play a central role in the community and enjoy social recognition for performing the cutting. For this reason, FGM/C is widely seen as a “women’s business”, because it is organized and practiced by older women on young girls.<sup>111</sup>

### 7.2.2 Medicalisation of FGM/C

The ‘medicalisation’ of FGM/C refers to the practice being performed by doctors or other members of the health profession.<sup>112</sup> Particularly in Egypt, Guinea, Kenya, Mali, Nigeria, Sudan, Yemen and Indonesia medicalisation is increasing.<sup>113</sup> In these countries, over 30% of the girls and women are cut by a health professional. An increased number of younger girls compared with older women are undergoing FGM/C by health professionals, demonstrating a trend towards the medicalisation of FGM/C.<sup>114</sup> The level of medicalisation is highest in Egypt, where a trained medical professional (most often a physician) carries out 77% of the FGM/C procedures.<sup>115</sup> It is estimated that nowadays, health care professionals carry out more than 18% of all FGM/C procedures.<sup>116</sup> Clinics that practice of FGM/C have been identified in Kenya and Guinea.<sup>117</sup> The reason for the medicalisation of FGM/C is the pretext of better quality or for safety reasons.<sup>118</sup>

The WHO has consistently and unequivocally condemned the practice of FGM/C by health professionals in any setting.<sup>119</sup> This statement of the WHO rests on “the basic ethics of health care whereby unnecessary bodily mutilation

<sup>110</sup> Traditional practitioners’ include traditional circumcisers, traditional birth attendants, *matrones* (traditional midwives) and other types of traditional practitioners.

<sup>111</sup> B. Shell-Duncan et al., *Women’s Business? Reassessing the Role of Men in the Perpetuation and Abandonment of Female Genital Cutting*, Annual Meeting of the Society for Applied Anthropology, March 2011, available at <http://paa2015.princeton.edu/uploads/151450> [Last Accessed 1 October 2015].

<sup>112</sup> P. Foldes and F. Martz, *The Medicalisation of female genital mutilation*, Forced Migration Review, May 2015, p. 6.

<sup>113</sup> United Nations Children’s Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 43; P.S. Yoder et al., *Female Genital Cutting in the Demographic and Health Surveys: A Critical and Comparative Analysis*, DHS Comparative Reports No 7, Calverton, September 2004, p. 37, 47-53.

<sup>114</sup> G.I. Serour, *Medicalization of Female Genital Mutilation/Cutting*, *African Journal of Urology*, Volume 19, No. 3, September 2013, p. 145.

<sup>115</sup> United Nations Children’s Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 43.

<sup>116</sup> World Health Organization, *Female Genital Mutilation, Fact Sheet No. 241*, WHO, February 2014, available at <http://www.who.int/mediacentre/factsheets/fs241/en/> [Last Accessed 1 October 2015].

<sup>117</sup> P. Foldes and F. Martz, *The Medicalisation of female genital mutilation*, Forced Migration Review, May 2015, p. 6.

<sup>118</sup> *Ibid.*

<sup>119</sup> World Health Organization, *Female Circumcision: Statement of WHO Position and Activities*, WHO, 1982.

cannot be condoned by health providers.”<sup>120</sup> This condemnation of medicalization of the WHO was further highlighted and reiterated by other UN agencies.<sup>121</sup> Medical licensing authorities and medical professional associations (such as the International Federation of Gynaecology and Obstetrics, the International Confederation of Midwives, the International Council of Nurses and the Medical Women’s International Association)<sup>122</sup> joined the UN agencies in condemning the ‘medicalization’ of FGM/C and called on all health professionals to refuse to perform FGM/C.<sup>123</sup> Dr. Foldes, a French surgeon who performs reconstructive surgery on women who have undergone FGM/C, argues that “in the vast majority of cases, medicalisation is clearly an aggravating factor in mutilation.”<sup>124</sup> He explains the following: “Traditional cutters are very well aware of how far they can go, particularly in terms of bleeding, and they understand that the death of young girls will neither serve their reputation nor help with recruiting new clients. As a result, the main nerve trunks are – paradoxically – avoided and thereby protected, as injuring them would also involve opening up blood vessels, resulting in an uncontrollable haemorrhage. [...] However, the use of anaesthesia – whether local, locoregional or general – makes it possible to cut, unhindered, a body that is open and at rest. Worse, a doctor, surgeon or health-care professional knows how to prevent haemorrhage and is therefore much less constrained by the presence of major blood vessels – and can cut much more extensively, as we have observed.”<sup>125</sup> Dr. Foldes claims that when FGM/C was being performed by doctors, often have been the ones that were most difficult to repair. He therefore argues that the medicalisation of FGM/C is a breach of ethics that “effects and tarnishes the entire health-care community.”<sup>126</sup>

### 7.3 Setting and Materials

FGM/C is usually performed in rural areas and most girls are cut at the girls’ home.<sup>127</sup> Even when medical professionals perform the procedure, half of the procedures still take place outside a clinical setting, in particular in the home.<sup>128</sup> The practice may be performed individually or girls are cut with a group of

<sup>120</sup> World Health Organization, *Management of Pregnancy, Childbirth and the Postpartum Period in the Presence of Female Genital Mutilation*, Report of a WHO Technical Consultation Geneva, 15-17 October 1997, HO/FCH/GWH/01.2, WHO/RHR/01.13, WHO, 2001, p. 38.

<sup>121</sup> World Health Organization, *Female Genital Mutilation: A Joint WHO/UNICEF/UNFPA Statement*, WHO Library, 1997; World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008; World Health Organization, *Global Strategy to Stop Health-Care Providers from Performing Female Genital Mutilation*, WHO/RHR/10.9, 2010.

<sup>122</sup> World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008, p. 38-41.

<sup>123</sup> B. Shell-Duncan, The Medicalization of Female “Circumcision”: Harm Reduction or Promotion of a Dangerous Practice?, *Social Science & Medicine*, Volume 52, 2001, p. 1014.

<sup>124</sup> P. Foldes and F. Martz, The Medicalisation of female genital mutilation, *Forced Migration Review*, May 2015, p. 6.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid, p. 7.

<sup>127</sup> United Nations Children’s Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 45.

<sup>128</sup> Ibid, p. 45.

other girls from the community. However, the importance of the ceremonial aspects associated with FGM/C is declining.<sup>129</sup> Non-sterile cutting devices are likely to be used, including: scissors, razor blades, knives, sharpened rocks or broken glass. These instruments are often reused on different girls (up to 30 girls at a time).<sup>130</sup> The practice is generally done without aesthetic, but depending on the involvement of health care professionals, the procedures may include a local or general aesthetic.

#### 7.4 Type of FGM/C Performed

Although the WHO typology<sup>131</sup> offers precise anatomical description, there are some limitations to this classification. This typology might be more useful in clinical observation than in surveys like the DHS and MICS that rely on self-reports from women.<sup>132</sup> The WHO recognized this and stated: “classification naturally entails simplification and hence cannot reflect the vast variations in actual practice.”<sup>133</sup> Medical anthropologist Yoder clarified that “each society has its own language and ways of classifying types of cutting that are known to members, types of cutting that do not necessarily correspond to the WHO designations. Establishing equivalence between such locally defined types and those proposed as guidelines by the WHO is not a simple matter.”<sup>134</sup> It therefore proved to be difficult to obtain reliable data during the DHS and MICS investigations on the type of FGM/C performed. Many women were unaware of the specific procedures performed on them, and in many settings it is culturally inappropriate to ask detailed questions about such matters, or to show illustrations.<sup>135</sup> For example, women in Niger used 50 different terms to describe the practice during the 1998 DHS survey when asked what happened to them.<sup>136</sup> For that reason, the typology of the WHO was to a certain extent left aside and used as a guideline instead. The DHS now determines which of three types of cutting (clitoridectomy, excision, or infibulation) a woman had undergone by differentiating between whether a girl or woman has been nicked, whether flesh has been removed, and whether tissue has been sewn closed. However, these categories do not fully match the WHO classification typology.

<sup>129</sup> United Nations Children's Fund, *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting*, UNICEF Innocenti Research Centre, 2005, p. 7.

<sup>130</sup> W. Wakabi, Africa Battles to Make Female Genital Mutilation History, *The Lancet*, Volume 369, 31 March 2007, p. 1070.

<sup>131</sup> See section 3 of this Chapter.

<sup>132</sup> United Nations Children's Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, 2013, p. 7.

<sup>133</sup> World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008, p. 23.

<sup>134</sup> P.S. Yoder et al., *Female Genital Cutting in the Demographic and Health Surveys: A Critical and Comparative Analysis*, DHS Comparative Reports No 7, Calverton, September 2004, p. 19.

<sup>135</sup> C. Johnson et al., Building a Community-Based Participatory Research Partnership with a Somali Refugee Community, *American Journal of Preventive Medicine*, Volume 37, No. 6, 2009, p. S230-S236.

<sup>136</sup> E. Gruenbaum, *The Female Circumcision Controversy: An Anthropological Perspective*, University of Pennsylvania Press, 2001, p. 155; United Nations Children's Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 48.

By far the largest proportion of women who had undergone FGM/C reported during the DHS and MICS surveys that they had some flesh removed (as opposed to being nicked or sewn closed).<sup>137</sup> Only in Eritrea, 46% of the women who had undergone FGM/C were 'nicked only'. In Burkina Faso, Chad, and Sudan, between 15-20% of the women were 'nicked only'.<sup>138</sup> The most severe form of FGM/C (infibulations) is most prevalent in northeastern Africa. In Sudan, 82% of the women who underwent FGM/C are sewn closed and in Eritrea this amounts to 39%.<sup>139</sup> Infibulations can be found in several West African countries as well, for example in Guinea (9%), Mali (10%) and Senegal (14%). In Kenya, 13% of the women who underwent FGM/C are infibulated. It should also be noted that about 20% of women who reported that they had undergone FGM/C said they did not know what was done to them.<sup>140</sup>

Local customs and ethnicity often determine which type of FGM/C girls undergo. For example in Eritrea, all girls from the *Hedarib* ethnicity were sewn closed, compared to only 2% of girls of the *Tigrigna* ethnicity.<sup>141</sup> UNICEF gathered evidence indicating that there is a trend towards less severe cutting across generations. For example in Djibouti, 83% of women aged 45-49 had undergone Type III (sewn closed), compared to 42% of girls aged 15-19.<sup>142</sup>

## 8 HEALTH CONSEQUENCES

The practice of FGM/C can cause serious adverse health consequences, since it involves removing and damaging healthy female genital tissue. FGM/C does not have any known health benefits.<sup>143</sup> The immediate and long-term health consequences depend on the type of FGM/C performed (the extent of the cutting), the expertise of the practitioner, the conditions under which it is performed (by a health care professional under hygienic conditions in a clinical setting or by a traditional cutter with non-sterile material at home), the amount of resistance and the general health condition of the girl or woman who undergoes the procedure.<sup>144</sup> Although FGM/C of any type is associated with a series of health risks, these risks are higher when the procedure is more extensive. Most frequent complications occur with infibulations (Type III).

<sup>137</sup> P.S. Yoder and S. Wang, *Female Genital Cutting: The Interpretation of Recent DHS Data*, DHS Comparative Reports No. 33, Calverton, September 2013, p. 40.

<sup>138</sup> *Ibid.*, p. 40.

<sup>139</sup> *Ibid.*, p. 39.

<sup>140</sup> *Ibid.*, p. 39.

<sup>141</sup> *Ibid.*, p. 46.

<sup>142</sup> United Nations Children's Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 110-111.

<sup>143</sup> World Health Organization, *Female Genital Mutilation, Fact Sheet No. 241*, WHO, February 2014, available at <http://www.who.int/mediacentre/factsheets/fs241/en/> [Last Accessed 1 October 2015].

<sup>144</sup> United Nations Population Fund, *A Holistic Approach to the Abandonment of Female Genital Mutilation/Cutting*, UNFPA, 2007, p. 4, available at [http://www.unfpa.org/sites/default/files/pub-pdf/726\\_filename\\_fgm.pdf](http://www.unfpa.org/sites/default/files/pub-pdf/726_filename_fgm.pdf) [Last Accessed 1 October 2015].

## 8.1 Immediate consequences

In the short term, FGM/C of all types can cause severe pain. Since the procedure is often performed without (proper) anaesthesia, cutting the sensitive genital tissue often causes extreme pain. FGM/C may also cause haemorrhage (excessive bleeding) and shock (caused by pain or haemorrhage or trauma of the procedure).<sup>145</sup> A common immediate complication with FGM/C is infection (including wound infection, septicaemia, gangrene and tetanus) caused by the lack of hygiene and the use of unsterile cutting instruments. Furthermore, it has been suggested that using the same unsterile cutting instrument on several girls who undergo FGM/C together increases the risk of transmission of Hepatitis B, C and HIV/AIDS.<sup>146</sup> Other immediate complications include pelvic fracture, open sores in the genital region and injury to nearby genital tissue.<sup>147</sup> Acute urinary retention may result from swelling and inflammation around the wound (particularly with type III).<sup>148</sup> FGM/C can also lead to death, caused by haemorrhage or infection (including tetanus and shock). It is unknown how many girls and women have died from FGM/C, since complications of FGM/C resulting in death may not be recognized or reported.<sup>149</sup>

## 8.2 Long-term consequences

The practice of FGM/C can have lifelong health consequences. Long-term health consequences may include chronic pain (for example during urination, menstruation, sexual intercourse and childbirth), vaginal infections, pelvic infections (which can cause chronic back and pelvic pain), recurrent urinary tract infections (which can lead to kidney damage), dermoid cysts, chronic genital abscesses and excessive scar tissue.<sup>150</sup> Damage to the urethra during the FGM/C procedure may lead to fistula and urethral strictures.<sup>151</sup>

FGM/C has also harmful obstetrical and neonatal consequences, including infertility,<sup>152</sup> increased risk of childbirth complications and newborn deaths.

<sup>145</sup> M.A. Dirie and G. Lindmark, The Risk of Medical Complications After Female Circumcision, *East African Medical Journal*, Volume 69, 1992, p. 479–482.

<sup>146</sup> However, there are no epidemiological studies to support this.

<sup>147</sup> World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008, p. 33–35.

<sup>148</sup> R.J. Cook et al., Female Genital Cutting (Mutilation/Circumcision): Ethical and Legal Dimensions, *International Journal of Gynecology and Obstetrics*, Volume 79, 2002, p. 281–287.

<sup>149</sup> D. Reisel and S.M. Creighton, Long Term Health Consequences of Female Genital Mutilation (FGM), *Maturitas*, Volume 80, No. 1, 2015, p. 48–51.

<sup>150</sup> L.Y. Hakim, Impact of Female Genital Mutilation on Maternal and Neonatal Outcomes During Parturition, *East African Medical Journal*, Volume 78, No. 5, 2001, p. 255–258; U. Larsen and F.E. Okonofua, Female Circumcision and Obstetric Complications, *International Journal of Gynecology and Obstetrics*, Volume 77, No. 3, 2002, p. 255–265; L. Morison et al., The Long-Term Reproductive Health Consequences of Female Genital Cutting in Rural Gambia: A Community-Based Survey, *Tropical Medicine and International Health*, Volume 6, No. 8, 2001, p. 643–653; H. Jones, et al., Female Genital Cutting Practices in Burkina Faso and Mali and their Negative Health Outcomes, *Studies in Family Planning*, Volume 30, No. 3, 1999, p. 219–230;

<sup>151</sup> E.J. Bieber et al., *Clinical Gynecology*, Cambridge Medicine, Cambridge University Press, 2015, p. 106.

<sup>152</sup> L. Almröth et al., Primary Infertility After Genital Mutilation in Girlhood in Sudan: A Case Control Study. *The Lancet*, Volume 366, 2005, p. 385–387.

Women who have undergone FGM/C face a significantly greater risk of needing caesarean section and face more post-partum difficulties compared to women who have not been cut.<sup>153</sup> Death rates among babies during and immediately after birth are higher for those born to mothers who have undergone FGM/C. A study conducted on 28,393 women attending delivery wards at 28 obstetric centres in Burkina Faso, Ghana, Kenya, Nigeria, Senegal and Sudan revealed that all types of FGM/C pose an increased risk to death to the baby. The risk of birth complication increases with the severity of FGM/C: death rates are 15% higher for those mothers with Type I, 32% higher for mothers with Type II and 55% higher for mothers with Type III.<sup>154</sup> The WHO estimates that FGM/C leads to one or two additional perinatal deaths per 100 deliveries.<sup>155</sup>

For the most extensive form of FGM/C (Type III), additional risks have been documented, since further surgery is usually necessary later in women's lives when infibulations need to be opened to allow for sexual intercourse and childbirth. In some countries the girl or woman is stitched several times, including after childbirth. This means that a girl or woman goes through repeated re-opening (defibulation)<sup>156</sup> and closing (reinfibulation)<sup>157</sup> procedures, further increasing and repeating both immediate and long-term health risks.<sup>158</sup> The amount of re-closure varies, but it often involves additional tightening of the introitus to the size before marriage.

### 8.3 Psychological, social and sexual consequences

The psychological, social and sexual consequences of FGM/C are under-researched and evidence on the non-medical consequences of FGM/C appears to be weak.<sup>159</sup> Only a few small-scale studies have tackled these effects of FGM/C.<sup>160</sup> Some of these studies suggest that women with FGM/C have more pain during sexual intercourse (dyspareunia), experience less sexual satisfaction and have a reduced sexual desire compared to women without FGM/C.<sup>161</sup> In

<sup>153</sup> E. Banks et al., Female Genital Mutilation and Obstetric Outcome: WHO Collaborative Prospective Study in Six African Countries, *The Lancet*, Volume 367, 2006, p. 1835–1841.

<sup>154</sup> Ibid, p. 1835–1841; World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008, p. 11.

<sup>155</sup> E. Banks et al., Female Genital Mutilation and Obstetric Outcome: WHO Collaborative Prospective Study in Six African Countries, *The Lancet*, Volume 367, 2006, p. 1835–1841.

<sup>156</sup> Defibulation is the cutting open of the infibulated labia.

<sup>157</sup> Reinfibulation is the re-stitching of the defibulated labia.

<sup>158</sup> World Health Organization, *Female Genital Mutilation, Fact Sheet No. 241*, WHO, February 2014, available at <http://www.who.int/mediacentre/factsheets/fs241/en/> [Last Accessed 1 October 2015].

<sup>159</sup> R.C. Berg et al, *Psychological, Social and Sexual Consequences of Female Genital Mutilation/Cutting (FGM/C): A Systematic Review of Quantitative Studies*, Report from Kunnskapssenteret (Norwegian Knowledge Centre for the Health Services) No. 13-2010, Nasjonalt Kunnskapssenter for Helsestjenesten, 2010.

<sup>160</sup> J. Whitehorn, Female Genital Mutilation: Cultural and Psychological Implications, *Sexual Relationships and Therapy*, Volume 17, No. 2, 2002, p. 161–170; C.M. Obermeyer, The Consequences of Female Circumcision for Health and Sexuality: An Update on the Evidence, *Culture, Health and Sexuality*, Volume 7, No. 5, 2005, p. 443–461.

<sup>161</sup> R.C. Berg et al, *Psychological, Social and Sexual Consequences of Female Genital Mutilation/Cutting (FGM/C): A Systematic Review of Quantitative Studies*, Report from Kunnskapssenteret (Norwegian



addition, women with FGM/C may be more likely to experience psychological disturbances (have a psychiatric diagnosis, suffer from anxiety, somatisation, phobia, and low self-esteem).<sup>162</sup> Other studies suggest that FGM/C is likely to cause various emotional disturbances as well, including depression, post-traumatic stress disorder and other psychiatric syndromes, including memory problems.<sup>163</sup>

## 9 REASONS FOR FGM/C

There is no clear-cut answer to the question why people practice FGM/C, since the justifications for the practice of FGM/C are numerous. Gruenbaum explained: "For some it is a rite of passage. For others it is not. Some consider it aesthetically pleasing. For others, it is mostly related to morality or sexuality."<sup>164</sup> Communities with various ethnical and religious backgrounds practice FGM/C and they live in many different countries. The reasons why FGM/C is practiced are multiple and include a mix of cultural, religious and social factors within families and communities.<sup>165</sup> Rahman and Toubia explained: "The reasons for FC/FGM are complex, related to each other and woven into the beliefs and values communities uphold."<sup>166</sup> Below, an overview is given of the several justifications of the practice.

### 9.1 Custom and tradition

The most commonly cited reasons for the continuation of the practice are 'custom' and 'tradition'.<sup>167</sup> FGM/C is often deeply rooted in local culture and has been passed from one generation to another.<sup>168</sup> An Egyptian woman testified: "Of course I shall have them circumcised, exactly as their parents,

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Knowledge Centre for the Health Services) No. 13-2010, Nasjonalt Kunnskapssenter for Helsetjenesten, 2010, p. 6; M.H. El-Defrawi et al., Female Genital Mutilation and its Psycho-Sexual Impact, *Journal of Sexual and Marital Therapy*, Volume 27, No. 5, 2001, p. 465–473.

<sup>162</sup> R.C. Berg et al., *Psychological, Social and Sexual Consequences of Female Genital Mutilation/Cutting (FGM/C): A Systematic Review of Quantitative Studies*, Report from Kunnskapssenteret (Norwegian Knowledge Centre for the Health Services) No. 13-2010, Nasjonalt Kunnskapssenter for Helsetjenesten, 2010, p. 5.

<sup>163</sup> A. Behrendt and S. Moritz, Posttraumatic Stress Disorder and Memory Problems After Female Genital Mutilation, *The American Journal of Psychiatry*, Volume 162, No. 5, 2005, p. 1000–1002; J. Kizilhan, Impact of Psychological Disorders after Female Genital Mutilation among Kurdish Girls in Northern Iraq, *The European Journal of Psychiatry*, Volume 25, No. 2, 2011, p. 92–100; E. Vloeberghs et al., Coping and Chronic Psychosocial Consequences of Female Genital Mutilation in the Netherlands, *Ethnicity Health*, Volume 17, No. 6, 2012, p. 677–695.

<sup>164</sup> E. Gruenbaum, *The Female Circumcision Controversy: An Anthropological Perspective*, University of Pennsylvania Press, 2001, p. 33.

<sup>165</sup> World Health Organization, *Female Genital Mutilation, Fact Sheet No. 241*, WHO, February 2014, available at <http://www.who.int/mediacentre/factsheets/fs241/en/> [Last Accessed 1 October 2015].

<sup>166</sup> A. Rahman and N. Toubia, *Female Genital Mutilation: A Guide to Laws and Policies Worldwide*, Zed Books, 2000, p. 5.

<sup>167</sup> P.S. Yoder et al., *Female Genital Cutting in the Demographic and Health Surveys: A Critical and Comparative Analysis*, DHS Comparative Reports No 7, Calverton, September 2004, p. 42.

<sup>168</sup> Human Rights Watch, *They Took Me and Told Me Nothing, Female Genital Mutilation in Iraqi Kurdistan*, June 2010, p. 34.

grandparents and sisters were circumcised. This is our custom."<sup>169</sup> FGM/C is an integral part of the cultural heritage of the community and a marker of ethnic identity; it defines – along with other physical or behavioural characteristics – who belongs to the group. Communities want to preserve their cultural identity and therefore uphold traditions like FGM/C. This creates powerful impetus to continue the practice. Toubia suggests: "the fear of losing the psychological, moral, and material benefits of 'belonging' is one of the greatest motivators of conformity."<sup>170</sup> Where FGM/C is carried out as part of the ritual initiation into womanhood, a girl cannot be considered an adult unless she has undergone FGM/C. This transition to adulthood is commonly celebrated through a rite of passage, usually at the time of puberty, involving a festive ceremony and celebration. The event is abundant in ritual and symbolism and can last up to weeks. The initiation also includes a period of seclusion and education about the rights and duties of a wife in order to prepare the girl for womanhood and marriage.<sup>171</sup> This process of "becoming" a woman contributes to the preservation of community customs and tradition.<sup>172</sup> Jomo Kenyatta, the first president of independent Kenya explained in his book *Facing Mount Kenya* how important the tradition is to the people of the Kikuyu ethnicity of central Kenya. He wrote: "No proper Gikuyu [Kikuyu] would dream of marrying a girl who has not been circumcised and vice versa."<sup>173</sup> He further argued that FGM/C was inherent in the initiation, which is in itself an essential part of being a Kikuyu, and to such a degree that "abolition... will destroy the tribal system."

## 9.2 Women's sexuality

Another common justification for FGM/C is related to women's sexuality. In many communities, it is believed that uncut women will not be able to control their sexuality and that "a girl who is not excised will run wild and disgrace her family."<sup>174</sup> In many communities that practice of FGM/C, family honour depends on a girl's virginity or sexual restraint.<sup>175</sup> An uncut girl will bring shame on herself and her family. The intention of FGM/C is to reduce women's sexual desire. It is believed that a woman with reduced sexual desire will not seek sexual relations outside marriage thereby ensuring marital fidelity. FGM/C safeguards the morality of women, prevents a woman from engaging in promiscuity and discourages her from sinful and deviant sexual behaviour, such as masturbation. FGM/C is also performed to reduce women's sexual demands on her husband, especially in polygamous communities, thus

<sup>169</sup> M.B. Assaad, Female Circumcision in Egypt: Social Implications, Current Research and Prospects for Change, *Studies in Family Planning*, Volume 11, No. 1, 1980, p. 3-16.

<sup>170</sup> N. Toubia, *Female Genital Mutilation, A Call for Global Action*, RAINBO publications, 1995, p. 37.

<sup>171</sup> P.S. Yoder et al., *Female Genital Cutting in the Demographic and Health Surveys: A Critical and Comparative Analysis*, DHS Comparative Reports No 7, Calverton, September 2004, p. 2.

<sup>172</sup> A. Rahman and N. Toubia, *Female Genital Mutilation: A Guide to Laws and Policies Worldwide*, Zed Books, 2000, p. 5.

<sup>173</sup> J. Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, Seeker and Warburg, 1959, p. 132.

<sup>174</sup> F. Hosken, *The Hosken Report: Genital and Sexual Mutilation of Females*, Women's International Network News, Lexington, MA, 1994, p. 40.

<sup>175</sup> A. Rahman and N. Toubia, *Female Genital Mutilation: A Guide to Laws and Policies Worldwide*, Zed Books, 2000, p. 5.

allowing him to have several wives.<sup>176</sup> FGM/C in general – but especially Type III – is also seen as a proof of chastity and virginity before marriage. In these (patriarchal) communities, virginity is a pre-requisite for marriage and is equated to female honour. The practice of FGM/C ensures and preserves the virginity of girls and keeps them “pure” until marriage. In these communities FGM/C is valued as a guarantee of marriage and subsequent economic security for the woman.

### 9.3 Religion

Many people believe that FGM/C is particular to the Muslim religious tradition. However, it is important to note that, although the practice is predominant among Muslim groups, FGM/C is also practiced across other religions including Christians, Jews, Animists and followers of traditional religions.<sup>177</sup> For example in Côte d'Ivoire, the prevalence is 64% among Muslims, 42% among those with no religion and 18% among Catholics.<sup>178</sup> In Ethiopia and Kenya, the prevalence is highest among Christian groups. Prevalence rates vary according to ethnicity, not religion.

Section 4 of this chapter explained that the practice of FGM/C predates the rise of Islam and Christianity.<sup>179</sup> None of the holy texts of any of the religions prescribe FGM/C.<sup>180</sup> For that reason, it has been argued that FGM/C is a “cultural” rather than a “religious” practice.<sup>181</sup> Although most of the Islamic world does not practice of FGM/C, the practice has acquired a religious dimension.<sup>182</sup> In many African countries (including Egypt, Eritrea, Guinea, Mali and Mauritania), significant proportions of the population practice FGM/C, because they think it is required by their religion.<sup>183</sup> Similarly, religious obligation is cited as the primary reason for performing FGM/C in the Middle East and Asia. In these countries, there is a widespread view that FGM/C is a

<sup>176</sup> A. Rahman and N. Toubia, *Female Genital Mutilation: A Guide to Laws and Policies Worldwide*, Zed Books, 2000, p. 6.

<sup>177</sup> The practice of FGM/C is not practiced among the Hindu- Buddhist religion. They reject the procedure of FGM/C. See also W.G. Clarence-Smith, *Islam and Female Genital Cutting in Southeast Asia: The Weight of the Past*, *Finnish Journal of Ethnicity and Migration*, Volume 3, No. 2, 2008, p. 14-22. The Jehovah's Witnesses have imposed a worldwide ban on the practice since 1985, see D.G. Barstow, *Female Genital Mutilation: The Penultimate Gender Abuse*, *Child Abuse & Neglect*, Volume 23, No. 5, 1999, p. 503.

<sup>178</sup> Institut National de la Statistique (INS) et ICF International. 2012. *Enquête Démographique et de Santé et à Indicateurs Multiples de Côte d'Ivoire 2011-2012*. Calverton, Maryland, USA: INS et ICF International, p. 329.

<sup>179</sup> A. Rahman and N. Toubia, *Female Genital Mutilation: A Guide to Laws and Policies Worldwide*, Zed Books, 2000, p. 6.

<sup>180</sup> I. El-Damanny, Editorial: The Jewish And Christian View On Female Genital Mutilation, *African Journal Of Urology*, Volume 19 No. 3, 2013, p. 127-129.

<sup>181</sup> A. Rahman and N. Toubia, *Female Genital Mutilation: A Guide to Laws and Policies Worldwide*, Zed Books, 2000, p. 6.

<sup>182</sup> Amnesty International, *What is Female Genital Mutilation?*, Amnesty International, Library Online Documentation Archive, ACT 77/006/1997, 1 October 1997, available at <http://web.archive.org/web/20070221013755/http://web.amnesty.org/library/index/ENGACT770061997> [Last Accessed 1 October 2015].

<sup>183</sup> United Nations Children's Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 69-71.

religious requirement. Members of these Muslim communities advocate in favour of the practice. Thus, although FGM/C is not referred to as a “religious practice”, in many countries FGM/C is strongly identified with Islam and thus interwoven with religion. According to UNICEF, the belief that FGM/C is a religious requirement contributes to the continuation of the practice.<sup>184</sup>

At the same time, no reference to FGM/C is to be found in the Quran.<sup>185</sup> However, a few *Hadiths* (traditions and sayings attributed to the Prophet Muhammad and other founders of Islam) refer to the practice. In these Islamic texts, Type I is referred to as *Sunna*, which means ‘tradition’ or ‘duty’ in Arabic, while the more severe forms of FGM/C (Type II and III) are referred to as *Khafd*. The *Hadith* that is most often cited by proponents of FGM/C to justify the practice is the one from the *Sunan Abu Dawood* and reads as follows: “A woman used to perform circumcision in Medina. The Prophet said to her: Do not cut severely as that is better for a woman and more desirable for a husband.”<sup>186</sup> Another *Hadith* used to support FGM/C practices is the one from *Musnad Ahmad*: “Circumcision is a commendable act for men (*Sunna*) and an honorable act (*Makromah*) for women.”<sup>187</sup> In addition to these often quoted *Hadiths*, there exist a few more *Hadiths* that are used to justify FGM/C.<sup>188</sup>

However, the different schools of Islamic jurisprudence hold different opinions on the practice of FGM/C and they are not unanimous on the subject. There are many debates about the authenticity of the *Hadiths* cited above dealing with FGM/C. Some Islamic scholars argue that the traditions attributed to Prophet Mohamed are authentic. Others argue that the *Hadiths* have a weak chain of transmission, which means that they are unreliable. The Imam Safi school considers FGM/C to be obligatory for both males and females. The Imam Ahmed Ibn Hanbal school considers FGM/C obligatory for males and an honorable act for females. The Imam Abu Hanifa and Imam Malik schools regard both male circumcision and FGM/C an honorable act for women.<sup>189</sup> However, none of the Islamic schools prohibits the practice and individual interpretation has turned FGM/C into a religious doctrine that commands it as a basic element of religious faith.<sup>190</sup>

In 2006, during a conference held in Cairo, important Muslim leaders in Egypt specifically rejected FGM/C because of the lack of scriptural support for

<sup>184</sup> United Nations Children’s Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 69.

<sup>185</sup> M. Selim Al-Awa, *FGM In the Context of Islam*, International Federation of Islamic Scholars, The National Council for Childhood and Motherhood, May 2012, available at [http://egypt.unfpa.org/Images/Publication/2012\\_05/d9174a63-2960-459b-9f78-b33ad795445e.pdf](http://egypt.unfpa.org/Images/Publication/2012_05/d9174a63-2960-459b-9f78-b33ad795445e.pdf) [Last Accessed 1 October 2015].

<sup>186</sup> *Sunan Abu Dawood*, Book 41, No. 5251.

<sup>187</sup> *Silsilah al-Ahadiith al-Da’ifah* by al-Albani, No. 1935.

<sup>188</sup> M. Selim Al-Awa, *FGM In the Context of Islam*, International Federation of Islamic Scholars, The National Council for Childhood and Motherhood, May 2012, p. 2-7, available at [http://egypt.unfpa.org/Images/Publication/2012\\_05/d9174a63-2960-459b-9f78-b33ad795445e.pdf](http://egypt.unfpa.org/Images/Publication/2012_05/d9174a63-2960-459b-9f78-b33ad795445e.pdf) [Last Accessed 1 October 2015].

<sup>189</sup> *Ibid*, p. 7.

<sup>190</sup> M. Budiharsana et al., *Female Circumcision in Indonesia: Extent, Implications and Possible Interventions to Uphold Women’s Health Rights*, Population Council, September 2003, p. 9, available at [http://www.taskforcefgm.de/wp-content/uploads/2012/11/FGM\\_in\\_Indonesien.pdf](http://www.taskforcefgm.de/wp-content/uploads/2012/11/FGM_in_Indonesien.pdf) [Last Accessed 1 October 2015].

the practice. The highest Sunni Muslim authority in Egypt, Sheikh Mohammad Sayyed Tantawi of Al-Azhar University openly stated that FGM/C is not an Islamic practice. He also revealed that his own daughter was not cut. In 2007, the Al-Azhar Supreme Council of Islamic Research in Egypt issued a *fatwa* (religious edict). It is the most authoritative condemnation of FGM/C in Islam to date. The *fatwa* explains that FGM/C has no basis in Sharia or any of its partial provisions, and that it is an act that should be avoided. Several regional and national *fatwas* in other countries have followed in the following years, with reference to the original statement of the Supreme Council of Islamic Research in Egypt as their basis.

#### 9.4 Hygiene and aesthetics

The practice of FGM/C is also justified on the grounds of hygiene and aesthetics. Some practicing communities are of the opinion that the female genitalia are dirty, bugly and unsightly.<sup>191</sup> Uncut women are regarded as unclean. For that reason the female genitalia must be cut to enhance a women's appearance and to facilitate cleanliness.<sup>192</sup> This justification of 'cleanliness' is also interlinked with the concept of gender identity. In some communities the clitoris is considered a "male like" or "masculine" part that has to be removed.<sup>193</sup> In order to create true femininity in women, one must be physically altered. Assaad explains: "Excision is practiced to clearly distinguish the sex of the person. A boy is a 'female' by virtue of his foreskin; a girl is 'male' by virtue of her clitoris."<sup>194</sup> It is also believed that Type III achieves smoothness that is considered to be beautiful and it makes women feminine.<sup>195</sup> Local terms used to refer to the practice are often synonymous with purification or cleanliness. In the Bambara language in Mali FGM/C is known as *bolokoli* ("washing your hands") and in the Igbo language in Nigeria as *isa aru* ("having your bath"). A common Arabic term for the practice is *tahara* ("purification").<sup>196</sup>

#### 9.5 Traditional myths and beliefs

Many myths and false beliefs are associated with the practice of FGM/C. In some communities, there is a belief that when the clitoris is not cut, it will

<sup>191</sup> A. El Dareer, *Woman, Why do you Weep? Circumcision and its Consequences*, Zed Books, 1982, p. 73.

<sup>192</sup> Marshall Cavendish Corporation, *Sex and Society, Volume 1*, Marshall Cavendish, 2010, p. 239.

<sup>193</sup> F. Ahmadu, *Rites and Wrongs: An Insider/Outsider Reflects on Power and Excision*, in: B. Shell-Duncan and Y. Hernlund, *Female "Circumcision" in Africa: Culture, Controversy and Change*, Lynne Rienner Publishers, 2000, p. 283–312; R.E.B. Johansen, *Experiencing Sex in Exile – Can Genitals Change Their Gender?*, in: Y. Hernlund and B. Shell-Duncan, *Transcultural Bodies: Female Genital Cutting in Global Context*, Rutgers University Press, 2007, p. 248–277.

<sup>194</sup> M.B. Assaad, *Female Circumcision in Egypt: Social Implications, Current Research, and Prospects for Change*, *Studies in Family Planning*, Volume 11, No. 1, 1980, p. 4.

<sup>195</sup> E. Gruenbaum, *Sexuality Issues in the Movement to Abolish Female Genital Cutting in Sudan*, *Medical Anthropology Quarterly*, Volume 20, No. 1, 2006, p. 121; A. Talle, *Transforming Women into 'Pure' Agnates: Aspects of Female Infibulation in Somalia*, in: T. Bleie et al., *Carved Flesh, Cast Selves: Gender Symbols and Social Practices*, Berg Press, 1993, p. 83–106.

<sup>196</sup> R.M. Abusharaf, *Female Circumcision: Multicultural Perspectives*, University of Pennsylvania Press, 2013, p. 1.

continue to grow until “it is as long as or longer than a penis and will dangle between legs.”<sup>197</sup> Some communities believe that a woman's clitoris is dangerous and that if it touches a man's penis, he will die. FGM/C is also believed to make child delivery easier and safer, because the clitoris could obstruct the birth of a baby during delivery. Others believe that if the baby's head touches the clitoris during childbirth, the baby will die. Some communities where FGM/C is practiced are convinced that the practice enhances woman's fertility and safeguards men's potency. Other communities believe that uncut women cannot conceive. In some communities, the enhancement of men's sexual pleasure is mentioned as a justification for FGM/C.<sup>198</sup> Anecdotal accounts, however, suggest that men prefer women who have not undergone FGM/C as sexual partners.

## 10 FGM/C AS A SOCIAL NORM

### 10.1 Social expectations

A prominent view of FGM/C is that it is a social norm. A common explanation for the continuation of FGM/C is social pressure within communities. According to Rahman and Toubia: “In a community where most women are circumcised, family, friends and neighbours create an environment in which the practice of circumcision becomes a component of social conformity.”<sup>199</sup> Christina Bicchieri explained that the practice of FGM/C can be considered a social norm if it meets the followings conditions: (i) individuals are aware of the rule of behavior regarding the cutting of girls and know that it applies to them; (ii) individuals prefer to conform to this rule because: a) they expect that a sufficiently large segment of their social group will cut their daughters, and b) they believe that a sufficiently large segment of their social group thinks that they ought to cut their daughters and may sanction them if they do not.<sup>200</sup> In communities where FGM/C is a social norm, the pressure to conform to what other community members are doing is a strong motivation to continue with the practice. Because of the social structures within the community, it is difficult for individuals to stop the practice of FGMC on their own since there is a strong fear of stigmatization and rejection. The following quote illustrates how FGM/C is considered a social norm in a Senegalese community:

<sup>197</sup> D.G. Barstow, *Female Genital Mutilation: The Penultimate Gender Abuse*, *Child Abuse & Neglect*, Volume 23, No. 5, 1999, p. 506.

<sup>198</sup> C. Almroth-Berggren et al., *Reinfibulation Among Women in a Rural Area in Central Sudan*, *Health Care Women International*, Volume 22, 2001, p. 711–721.

<sup>199</sup> A. Rahman and N. Toubia, *Female Genital Mutilation: A Guide to Laws and Policies Worldwide*, Zed Books, 2000, p. 6.

<sup>200</sup> C. Bicchieri, *The Grammar of Society: Nature and Dynamics of Social Norms*, Cambridge University Press, 2006; C. Bicchieri, *Norms, Conventions, and the Power of Expectations*, in: N. Cartwright and E. Montuschi, *Philosophy of Social Science*, Oxford University Press, 2012; C. Bicchieri, R. Muldoon, *Social Norms*, *The Stanford Encyclopedia of Philosophy*, 2011; United Nations Children's Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 14–17.

““Let’s talk about why girls are cut,” Ndey said after the women had returned to their seats. “What consequences befall a girl who is not cut?” Why were girls cut? It was a silly question, like asking why one breathes. Every woman in the room knew that the tradition was among the most momentous events of a girl’s life, preparing her to become a woman, to eventually be deemed acceptable for marriage, and most important of all, to fully belong and have a respected role within her society. For a girl not to be cut – to be a bilakoro, a name considered among the worst insults in their culture – was unimaginable. Not only would a bilakoro have trouble finding a husband, she would also be rejected and ostracized by the rest of the community, by women especially. Considered impure and unfit to enter the circle of “real women,” the food she cooked would not be eaten, the clothes she washed rewashed by others.”<sup>201</sup>

Similarly, Shell-Duncan also found in her study that girls who were not cut, “are contemptuously insulted by being labeled *solima*, meaning not only uncircumcised, but also rude, ignorant, immature, uncivilized, and unclean; women who are *solima* are told they know nothing, and are harassed and excluded by women for not knowing how to behave properly.”<sup>202</sup>

## 10.2 Social convention theory

Political theorist Mackie worked together with Bicchieri and developed the so-called ‘theory of self-enforcing social conventions’ (also referred to as the ‘social norm approach’). According to Mackie, the social convention theory “offers an explanation for how certain harmful social practices are self-enforcing social conventions, why they are universal in a community and why they are strongly resistant to change.”<sup>203</sup> The social convention theory provides insights in how harmful practices have been sustained over generations.<sup>204</sup> Mackie was inspired by the practice of footbinding in China. This harmful practice affected most Chinese women for a thousand years, but ended, for the most part, in a single generation. Mackie argues that footbinding and FGM/C are closely equivalent practices.<sup>205</sup>

### 10.2.1 Origins in game theory

The origins of Mackie’s social convention theory can be found in game theory. Game theory is “the study of mathematical models of conflict and cooperation between intelligent rational decision-makers.”<sup>206</sup> In other words: the study of

<sup>201</sup> A. Molloy, *However Long the Night: Molly Melching’s Journey to Help Millions of African Women and Girls Triumph*, Harper Collins Publishers, 2013, p. 5-6.

<sup>202</sup> B. Shell-Duncan et al., Dynamics of Change in the Practice of Female Genital Cutting in Senegambia: Testing Predictions of Social Convention Theory, *Social Science & Medicine*, Volume 73, No. 8, 2011, p. 1280.

<sup>203</sup> G. Mackie and J. LeJeune, *Social Dynamics of Abandonment of Harmful Practices: A New Look at the Theory*, Innocenti Working Paper 2009-06, Special Series on Social Norms and Harmful Practices, UNICEF Innocenti Research Center, Florence, May 2009, p. 9.

<sup>204</sup> United Nations Children’s Fund, *Coordinated Strategy to Abandon Female Genital Mutilation/Cutting in one Generation: A Human Rights-Based Approach to Programming*, Technical Note, UNICEF Innocenti Research Centre, 2007, p. 42.

<sup>205</sup> G. Mackie, Ending Footbinding and Infibulation: A Convention Account, *American Sociological Review*, Volume 61, No. 6, 1996, p. 1000.

<sup>206</sup> R.B. Myerson, *Game Theory: Analysis of Conflict*, Harvard University Press, 1991, p. 1.

strategic decision-making. Game theoretic concepts apply whenever the actions of individuals are interdependent.<sup>207</sup> Mackie used the game-theoretic model and Coordination Diagram of the economist Schelling<sup>208</sup> to show that the end of footbinding in China was a convention shift. He highlighted that when a social convention or a social norm is in place, decision-making is an interdependent process in which the choice made by one player in the game depends on the choice made by the second player, whose choice, in turn, depends on the choice made by the first.<sup>209</sup> In an interdependent larger group, the choice of each player depends on the choice of all as a result of reciprocal expectations.<sup>210</sup>

#### 10.2.2 Assumption: parents love their children

Mackie's initial assumption in relation to the decision-making process of FGM/C is that "parents love their children and ultimately want to do what is best for them."<sup>211</sup> Families carry out FGM/C in order to ensure the marriageability and status of their daughters within the 'intramarrying' group.<sup>212</sup> In a community where all girls have undergone FGM/C as a prerequisite for marriage, fathers and mothers believe that girls must be cut as a condition for marriage.<sup>213</sup> Families will therefore choose to cut their own daughter(s), to ensure they are prepared for adulthood and can have a 'proper' marriage. This marriage is very often essential for the girl's economic and social security. If a family decides not to cut their daughter(s), they will find it more difficult (if not impossible) to get married. In addition, the failure to conform to the norm of FGM/C may lead to social exclusion, avoidance, ostracism, disapproval, rebuke or even violence.<sup>214</sup> Uncut girls are likely to become socially outcast (see also quote in para. 3.9.1). On the other hand, when families conform to the norm, they meet with social approval; it brings respect and admiration, and maintains social standing for a girl and her family in the community.<sup>215</sup> Taking into account these social rewards and sanctions, FGM/C is perceived as the best choice for parents to ensure their daughters to have a 'good' future.

<sup>207</sup> T.L. Turocy and B. von Stengel, *Game Theory*, *Encyclopedia of Information Systems*, Volume 2, 2002, p. 403-420.

<sup>208</sup> T. Schelling, *The Strategy of Conflict*, Harvard University Press, 1960, p. 225.

<sup>209</sup> United Nations Children's Fund, *Coordinated Strategy to Abandon Female Genital Mutilation/Cutting in one Generation: A Human Rights-Based Approach to Programming*, Technical Note, UNICEF Innocenti Research Centre, 2007, p. 14.

<sup>210</sup> G. Mackie and J. LeJeune, *Social Dynamics of Abandonment of Harmful Practices: A New Look at the Theory*, Innocenti Working Paper 2009-06, Special Series on Social Norms and Harmful Practices, UNICEF Innocenti Research Center, Florence, May 2009, p. 9.

<sup>211</sup> G. Mackie, *Ending Footbinding and Infibulation: A Convention Account*, *American Sociological Review*, Volume 61, No. 6, 1996, p. 1003 and 1007.

<sup>212</sup> G. Mackie and J. LeJeune, *Social Dynamics of Abandonment of Harmful Practices: A New Look at the Theory*, Innocenti Working Paper 2009-06, Special Series on Social Norms and Harmful Practices, UNICEF Innocenti Research Center, Florence, May 2009, p. 10.

<sup>213</sup> United Nations Children's Fund, *The Dynamics of Social Change: Towards the Abandonment of Female Genital Mutilation/Cutting in Five African Countries*, UNICEF Innocenti Research Centre, October 2010, p. 6.

<sup>214</sup> United Nations Children's Fund, *The Dynamics of Social Change: Towards the Abandonment of Female Genital Mutilation/Cutting in Five African Countries*, UNICEF Innocenti Research Centre, October 2010, p. 6.

<sup>215</sup> *Ibid*, p. 6.



### 10.2.3 *Two equilibrium states*

When FGM/C is universal within the intramarrying group, not only the parents, but girls themselves may want to be cut as well.<sup>216</sup> According to Mackie, FGM/C in this way is a powerful social convention, because FGM/C is a social rule that members of a community follow, based on the expectation that others have done the same and that others will follow.<sup>217</sup> What one family chooses to do in communities where FGM/C is widely practiced depends upon what other families do. No single family will deviate from that. Mackie describes this as an 'equilibrium state', because no family has an incentive to deviate from the social expectation of FGM/C. Women believe that men would not marry a woman who did not undergo FGM/C, and men believe that a woman who did not undergo FGM/C would not be a faithful partner in marriage.<sup>218</sup> A peculiar characteristic of the social convention theory applied to FGM/C is that even if each family in the intramarrying community thinks that it would be better to abandon the practice, no family acting on their own can succeed.<sup>219</sup> Every family can come to the conclusion that FGM/C is wrong, but that is not enough. FGM/C would in that case continue, because any family abandoning FGM/C on its own would negatively affect the future of its daughters. Enough families must abandon it at once so that their daughters' futures are secured.<sup>220</sup> The social convention theory illustrates that when all families in a community choose not to have their daughters cut, then FGM/C would not be a prerequisite for marriage any more. For that to be effective, it is necessary for everyone in the intramarrying community to abandon FGM/C together. This is an 'equilibrium state' too, because all families are acting in the same way and no family has an incentive to cut their daughters.

### 10.2.4 *Collective abandonment*

The main challenge is to move all families from the worse equilibrium (when all daughters have undergone FGM/C) to the best equilibrium (where no daughters have undergone FGM/C), a so-called 'convention-shift'. Mackie argues that abandonment is possible, but only by coordinating a collective abandonment within the intramarrying community. Families will only abandon FGM/C when they are convinced that (most of) the other families in the community will make the same choice at the same time.<sup>221</sup> According to Mackie, collective abandonment of FGM/C makes everyone better off, as families preserve their status and daughters preserve their marriageability, but do not

<sup>216</sup> United Nations Children's Fund, *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting*, UNICEF Innocenti Research Centre, 2005, p. 11.

<sup>217</sup> *Ibid.*

<sup>218</sup> G. Mackie, *Ending Footbinding and Infibulation: A Convention Account*, *American Sociological Review*, Volume 61, No. 6, 1996, p. 1008.

<sup>219</sup> G. Mackie, *Female Genital Cutting: The Beginning of the End*, in: B. Shell-Duncan and Y. Hernlund (eds.), *Female "Circumcision" in Africa: Culture, Controversy, and Change*, Lynne Reiner Publishers, 2000, p. 255.

<sup>220</sup> *Ibid.*

<sup>221</sup> United Nations Children's Fund, *The Dynamics of Social Change: Towards the Abandonment of Female Genital Mutilation/Cutting in Five African Countries*, UNICEF Innocenti Research Centre, October 2010, p. 6.

undergo the FGM/C.<sup>222</sup> Collective abandonment will occur if a 'tipping point', a large enough portion of the community, is willing to abandon FGM/C. The 'tipping point' can be achieved by mobilizing a relatively small group of community members seeking change (the so-called 'first-movers' or 'critical mass'), who are motivated to persuade and show others in the group the benefits of not practicing FGM/C. They also have the incentive to recruit other members of the community to join them in the effort to abandon FGM/C. The process through which the critical mass spread the knowledge and action to other families and communities is called 'organized diffusion'.<sup>223</sup> According to Mackie, "Organized diffusion uses local networks of social relationships to promote conditional commitment to abandon FGM/C, within not only the residential community but also beyond it to other communities, not always nearby, that intramarry with the target community." It is not necessary at the outset to gain the support of the entire community, but a large part of the community needs to be in favour of community abandonment of FGM/C.<sup>224</sup> In order to attain stable abandonment of FGM/C, Mackie argues that a public commitment is required of the greater part of the intramarrying community to show that each member can see that most others in the community abandon the practice of FGM/C.<sup>225</sup> The community commitment must result in a moment of social recognition when the abandonment of FGM/C is rendered public and explicit. This could be an authoritative written statement or public declaration at a large public gathering.<sup>226</sup> This is a milestone in the process of abandonment, because then there is a permanent change in reciprocal expectations and there is no reason for the community to go back to FGM/C.<sup>227</sup> There is a shift in the convention, because community members are now expected to not cut their daughters and will be socially rewarded or sanctioned accordingly.<sup>228</sup>

### 10.3 Social convention theory & UNICEF

The social convention theory has been embraced by UNICEF and is also at the core of the programme framework of the 'UNFPA-UNICEF Joint Programme

<sup>222</sup> G. Mackie and J. Lejeune, *Social Dynamics of Abandonment of Harmful Practices: A New Look at the Theory*, Innocenti Working Paper 2009-06, Special Series on Social Norms and Harmful Practices, UNICEF Innocenti Research Center, Florence, May 2009, p. 11.

<sup>223</sup> United Nations Children's Fund, *Coordinated Strategy to Abandon Female Genital Mutilation/Cutting in one Generation: A Human Rights-Based Approach to Programming*, Technical Note, UNICEF Innocenti Research Centre, 2007, p. 19-21.

<sup>224</sup> G. Mackie and J. Lejeune, *Social Dynamics of Abandonment of Harmful Practices: A New Look at the Theory*, Innocenti Working Paper 2009-06, Special Series on Social Norms and Harmful Practices, UNICEF Innocenti Research Center, Florence, May 2009, p. 12.

<sup>225</sup> *Ibid*, p. 14-15.

<sup>226</sup> United Nations Children's Fund, *The Dynamics of Social Change: Towards the Abandonment of Female Genital Mutilation/Cutting in Five African Countries*, UNICEF Innocenti Research Centre, October 2010, p. vii.

<sup>227</sup> United Nations Children's Fund, *Coordinated Strategy to Abandon Female Genital Mutilation/Cutting in one Generation: A Human Rights-Based Approach to Programming*, Technical Note, UNICEF Innocenti Research Centre, 2007, p. 13.

<sup>228</sup> United Nations Children's Fund, *The Dynamics of Social Change: Towards the Abandonment of Female Genital Mutilation/Cutting in Five African Countries*, UNICEF Innocenti Research Centre, October 2010, p. vii.

on Female Genital Mutilation/Cutting: Accelerating Change.’ According to UNICEF, there is a “growing appreciation of the usefulness of a social norms perspective in addressing FGM/C.”<sup>229</sup> Many UN documents refer to Mackie’s social convention theory. For example, the UN Interagency Statement on FGM/C states the following: “Where female genital mutilation is widely practised, it is supported by both men and women, usually without question, and anyone departing from the norm may face condemnation, harassment, and ostracism. As such, female genital mutilation is a social convention governed by rewards and punishments, which are a powerful force for continuing the practice. In view of this conventional nature of female genital mutilation, it is difficult for families to abandon the practice without support from the wider community.”<sup>230</sup> The UN Secretary-General’s report to the United Nations General Assembly on the girl child also highlighted the social norms perspective in the discussion of FGM/C: “It is now widely acknowledged that it [FGM/C] functions as a self-enforcing social convention or social norm. In societies where it is practiced it is a socially upheld behavioural rule. Families and individuals uphold the practice because they believe that their group or society expects them to do so. Abandonment of the practice requires a process of social change that results in new expectations on families.”<sup>231</sup>

However, the social convention theory of Mackie was recently seriously criticized. Several scholars argued that there is a lack of empirical research providing evidence that a public declaration reduces the practice of FGM/C.<sup>232</sup> More specifically, in a recently published article in *Science*, they argue that, given the considerable development funds at stake, “no one has provided data clearly showing that female genital cutting exhibits the characteristics of a social norm based on coordination.” By conducting an empirical study in Sudan, these scholars did not find any evidence for the social convention theory.

## 11 CONCLUSION

FGM/C is a very complex and multifaceted practice. The reasons and justifications for the (continuation of the) practice are numerous, intertwined and related to each other. Frazer noted: “In reality, no two places engage in FGC for the exact same reasons, at the same age, or even perform the exact same procedure.”<sup>233</sup> The practice of FGM/C differs from country to country and even within countries among different ethnic groups, depending on local traditions and circumstances. Taking into account the age at which FGM/C

<sup>229</sup> United Nations Children’s Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 15.

<sup>230</sup> World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008, p. 5.

<sup>231</sup> United Nations General Assembly, *The Girl Child: Report of the Secretary-General*, A/64/315, 21 August 2009, p. 17, para. 68.

<sup>232</sup> C. Efferson et al., Female Genital Cutting is not a Social Coordination Norm, *Science*, Volume 349, No. 6255, September 2015, p. 1447.

<sup>233</sup> J.E. Frazer, Topical Review Digest: *Human Rights in Sub-Saharan Africa*, p. 6, available at <http://www.du.edu/korbel/hrhw/researchdigest/africa/HRinSubSaharanAfrica.pdf> [Last Accessed 1 October 2015].

occurs, the conditions under which FGM/C is practiced, the health consequences and risks associated with the practice, as well as the justifications of the practice as described in this chapter, the international community framed the practice of FGM/C as a human rights violation. The next chapter will explain which human rights are at stake in relation to the practice of FGM/C, and describes the efforts of the international community (UN) and African Union (AU) to eliminate the practice.



## CHAPTER IV

# FEMALE GENITAL MUTILATION/CUTTING: A VIOLATION OF HUMAN RIGHTS

*“Any harmful aspect of certain traditional, customary or modern practices that violates the rights of women should be prohibited and eliminated. Governments should take urgent action to combat and eliminate all forms of violence against women in private and public life, whether perpetrated or tolerated by the State or private persons.”*

Beijing Declaration and Platform for Action, 1995<sup>1</sup>

### 1 INTRODUCTION

The previous chapter showed that – although FGM/C is a practice that is approximately 5000 years old – it was only in the second half of the 20<sup>th</sup> century that the practice of FGM/C became known in the Western world.<sup>2</sup> European travellers and missionaries documented the practice and evidence for the existence of FGM/C was provided by small clinical studies. The earliest UN initiatives to place FGM/C on the international agenda also date back from the 1950s<sup>3</sup> when African activists and medical practitioners brought (the harmful health consequences of) FGM/C to the attention of the UN and the WHO.<sup>4</sup> Initially, the UN was reluctant to take action in the field of FGM/C and placed the practice outside the scope of international human rights law. However, this changed in the 1990s with the global movement against VAW. The international community considered FGM/C a form of VAW, falling within the human rights framework, and classified the practice as a violation of various human rights. In this chapter, a legal analysis will be conducted and the human rights that are being violated with the practice of FGM/C will be addressed, as well as the obligations and recommendations for States that follow from the human rights framework.

The structure of this chapter is as follows. The research question (section 2) and methodology applied for this legal analysis is laid out in section 3. Section 4

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<sup>1</sup> United Nations, *Beijing Declaration and Platform for Action*, adopted at the Fourth World Conference on Women, 27 October 1995, para. 224.

<sup>2</sup> See Chapter III, section 4 and 5 of this research.

<sup>3</sup> United Nations Office of the High Commissioner for Human Rights, *Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children*, August 1995, No. 23, p. 2, available at <http://www.refworld.org/docid/479477410.html> [Last Accessed 1 October 2015].

<sup>4</sup> F.A. Althaus, *Female Circumcision: Rite of Passage Or Violation of Rights?*, *International Family Planning Perspectives*, Volume 23, No. 3, September 1997, p. 1.

will further describe how the classification of FGM/C as a human rights violation evolved over time. A short analysis of the universalism-cultural relativism debate is provided in section 5. A legal analysis of the human rights violated by FGM/C can be found in section 6, as well as a short overview of the human rights that can be invoked in favour of the practice. An analysis of the obligations and recommendations for States prescribed by the human rights framework in relation to the practice of FGM/C are provided in section 7. Concluding observations are spelled out in section 8.

## 2 RESEARCH QUESTIONS

The two research questions that will be addressed in this chapter are the following: “Which human rights are being violated with the practice of Female Genital Mutilation/Cutting?” and “What are the duties of States (and non-State actors) concerning Female Genital Mutilation/Cutting prescribed by the human rights framework?”

## 3 METHODOLOGY

In order to provide an answer to these two research questions, a legal analysis was conducted. Since the international community considers the practice of FGM/C a form of VAW and a harmful practice,<sup>5</sup> all human rights instruments and documents focussing on VAW and harmful practices were consulted during the analysis, as well as instruments and documents specifically focussing on practice of FGM/C. The publication *Female Genital Mutilation: A Guide to Laws and Policies Worldwide* of Rahman and Toubia was a very useful starting point during the search for relevant instruments and documents. As explained in the introduction of this thesis, the ‘human rights framework’ consists not only of international human rights laws *strictu sensu*, but must be

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<sup>5</sup> Harmful practices are defined as: “persistent practices and forms of behaviour that are grounded in discrimination on the basis of, among other things, sex, gender and age, in addition to multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering.” Harmful practices specifically addressed in the Joint general recommendation are: FGM/C, child and/or forced marriage, polygamy, and crimes committed in the name of so-called honour. In addition, other practices that the CEDAW and CRC Committee consider harmful are the following: “neglect of girls (linked to the preferential care and treatment of boys), extreme dietary restrictions (forced feeding, food taboos, including during pregnancy), virginity testing and related practices, binding, scarring, branding/tribal marks, corporal punishment, stoning, violent initiation rites, widowhood practices, witchcraft, infanticide and incest. Harmful practices also include body modifications that are performed for the purpose of beauty or marriageability of girls and women (such as fattening, isolation, the use of lip discs and neck elongation with neck rings) or in an attempt to protect girls from early pregnancy or from being subjected to sexual harassment and violence (such as breast ironing/“repassage”). In addition, many women and children throughout the world increasingly undergo medical treatment and/or plastic surgery to comply with social norms of the body and not for medical or health reasons and many are also pressured to be fashionably thin which has resulted in an epidemic of eating and health disorders.” United Nations Committee on the Elimination of Discrimination Against Women and the United Nations Committee on the Rights of the Child, *Joint general Recommendation No. 31 of the Committee on the Elimination of Discrimination Against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices*, CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014, para. 9, 15, and 19-30.

understood broadly and includes also soft law documents (i.e. non-binding declarations, resolutions, general recommendations, general comments, consensus documents, guidelines, statements of intent, memoranda of understanding, principles).<sup>6</sup>

Senegal has been chosen as a case study in this research. Therefore, the legal analysis focused on the human rights documents and instruments of the UN and the AU.<sup>7</sup> Since Senegal is one of the Member Countries<sup>8</sup> of Economic Community of West African States (ECOWAS),<sup>9</sup> the documents and instruments of ECOWAS were looked at as well. However, ECOWAS did not adopt any instruments or documents that have direct relevance in relation to the practice of FGM/C.<sup>10</sup> ECOWAS refers to the African Charter on Human and Peoples' Rights instead.<sup>11</sup> UN treaties were found at the United Nations Treaty Collection<sup>12</sup> and other UN documents via Refworld<sup>13</sup> and the Office of the High Commissioner for Human Rights (OHCHR).<sup>14</sup> Documents of the AU were found at the website of the African Commission on Human and People's Rights.<sup>15</sup> In addition, academic literature and reports of CSOs about the human rights framework in relation to FGM/C were also consulted.

Search terms used to find the human rights documents and instruments needed were not only 'female genital mutilation/cutting' or 'FGM/C' – the terms used in this thesis – but also 'female genital mutilation', 'FGM', 'female genital cutting', 'FGC', 'female circumcision', 'FC', 'circumcision', 'female genital surgery', 'FGS', 'female genital operations', 'genital operations', 'female sexual mutilation', 'sexual mutilation', 'mutilation', 'harmful practice', 'harmful', 'practice', 'customary practice', 'custom', 'traditional practice', 'traditional custom', 'cultural practice', 'social practice', 'tradition', 'traditional'

<sup>6</sup> A. Boyle and C. Chinkin, *The Making of International Law*, Oxford University Press, 2007, p. 210-229.

<sup>7</sup> In addition, human rights documents and instruments adopted by the Council of Europe, European Union and Organization of American States (including the Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union and the American Convention on Human Rights) were excluded from the analysis, since they are not applicable in Senegal.

<sup>8</sup> The other member countries are Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Sierra Leone, Senegal and Togo.

<sup>9</sup> The aims of ECOWAS are to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, see Economic Community of West African States, *Revised Treaty of the Economic Community of West African States*, 24 July 1993, Article 3(1).

<sup>10</sup> ECOWAS refer in their Fundamental Principles to the "recognition, promotion and protection of human and peoples' rights" and ECOWAS has also established the ECOWAS Gender Development Centre, see Economic Community of West African States Gender Development Centre, *Priority Areas*, available at <http://dummy.ccdg.ecowas.int/what-we-do/priority-areas/> [Last Accessed 1 October 2015].

<sup>11</sup> Economic Community of West African States, *Revised Treaty of the Economic Community of West African States*, 24 July 1993, Article 4(g).

<sup>12</sup> United Nations Treaty Collection, available at <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> [Last Accessed 1 October 2015].

<sup>13</sup> Refworld, available at <http://www.refworld.org/> [Last Accessed 1 October 2015].

<sup>14</sup> Office of the High Commissioner for Human Rights, available at <http://www.ohchr.org/EN/Pages/WelcomesPage.aspx> [Last Accessed 1 October 2015].

<sup>15</sup> African Commission on Human and People's Rights, available at <http://www.achpr.org/instruments> [Last Accessed 1 October 2015].



and 'culture'. Although all human rights instruments and documents of the UN and AU generally focusing on VAW and harmful practices were consulted, only those human rights instruments and documents that specifically focused on FGM/C and instruments and documents that have direct relevance in relation to the practice of FGM/C were included in the analysis.

The overall aim of the legal analysis was in the first place to describe which rights are being violated and in the second place to provide an overview of the obligations and recommendations for States in relation to the elimination of FGM/C. The aim of this legal analysis was not to assess whether the human rights framework in general or a specific human rights instrument or document has a good or a bad approach, or whether the rationale of specific provisions in human rights instruments and documents is efficient in order to achieve the elimination of FGM/C. Instead, the human rights framework as developed by the UN and AU will be taken *as it is* when answering the 'compliance question'. This human rights framework will be described and analyzed, without making a substantive normative judgment about the framework itself.

#### 4 CLASSIFICATION OF FGM/C AS A HUMAN RIGHTS VIOLATION

##### 4.1 Attention for FGM/C in the 1950s

Several intergovernmental bodies of the UN started to carefully address harmful traditional practices in the early 1950s.<sup>16</sup> For example, the UN Commission on the Status of Women (CSW) began to focus on FGM/C as part of an attempt to "confront the problem of customs, ancient laws and rituals that harm women's health and well-being and trample on their rights."<sup>17</sup> In 1952, acting on the recommendations of CSW, the Economic and Social Council (ECOSOC) requested Member States to "take immediately all necessary measures with a view to abolish progressively [...] all customs that violate the physical integrity of women and which thereby violate the dignity and worth of the human person as proclaimed in the Charter and in the Universal Declaration of Human Rights."<sup>18</sup> The response of UN Member States was mixed. Some Member States emphasized that FGM/C is detrimental to women's and girl's health and well-being and should therefore be abolished. They argued that education would gradually change these deeply rooted customs.<sup>19</sup> Other UN Member States argued that abolishing traditional practices like FGM/C was in violation with the Principles of Article 2 of the UN Charter,<sup>20</sup> which forbids interference in the domestic affairs of Member States.<sup>21</sup>

<sup>16</sup> United Nations General Assembly, *Traditional or Customary Practices Affecting the Health of Women: Report of the Secretary-General*, A/53/354, 10 September 1998, p. 2.

<sup>17</sup> United Nations Children's Fund, *To the Symposium on Female Genital Mutilation in Berlin*, 8 March 2003, available at [http://www.unicef.org/french/media/media\\_9297.html](http://www.unicef.org/french/media/media_9297.html) [Last Accessed 1 October 2015].

<sup>18</sup> Economic and Social Council, *Resolution E/RES/445 C (XIV)*, 28 May 1952.

<sup>19</sup> P.D. Jain, *Women, Development, and the UN: A Sixty-Year Quest for Equality and Justice*, United Nations Intellectual History Project Series, Indiana University Press, 2005, p. 29.

<sup>20</sup> Article 2(7) of the UN Charter reads as follows: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the

In 1958, ECOSOC requested the WHO to undertake an inquiry on the persistence of customs subjecting girls to “ritual operations” and of the measures adopted or planned to stop such practices.<sup>22</sup> However, the WHO turned down the request and refused to study the issue of FGM/C, claiming that this practice fell “outside the competence” of the WHO since the practice is based on social and cultural backgrounds, rather than medical.<sup>23</sup> The WHO continued to uphold this stance until the late 1970s.

#### 4.2 African Activism in the 1960s and 1970s

As a consequence, FGM/C was not focus of international attention between the 1950s and 1960s. International organizations concluded that the practice of FGM/C “formed a part of African customs and traditions and that, out of respect, they [the international community] should not interfere.”<sup>24</sup> Lee explains that international organizations “were cautious to address a problem that was a local phenomenon and embedded with a high degree of cultural sensitivity.”<sup>25</sup>

In the 1960s and 1970s, African activism against FGM/C further developed. Women’s organizations led campaigns in many countries, raising awareness and educate the people about the harmful effects of FGM/C on the health of girls and women. Rahman and Toubia explained: “doctors – mostly in Sudan, Somalia and Nigeria – who observed patients suffering from complications of FGM/C began to document the procedure and write about its clinical complications in medical journals.”<sup>26</sup>

#### 4.3 Condemnation of FGM/C by the WHO in 1979

The UN GA proclaimed the period from 1976 to 1985 the ‘United Nations Decade for Women’.<sup>27</sup> During these years, several important seminars and international meetings took place, where the silence surrounding FGM/C was broken.<sup>28</sup> These seminars paved the way towards international recognition that the practice of FGM/C contains a human rights violation. In 1976, the Director-

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present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.” United Nations, *Charter of the United Nations*, 24 October 1945, Article 2(7).

<sup>21</sup> M.L. Penn, *Overcoming Violence Against Women and Girls: The International Campaign to Eradicate a Worldwide Problem*, Rowman & Littlefield, 2003, p. 4.

<sup>22</sup> World Health Organization, *Resolution 680 B II (XXVI) of the Economic and Social Council: Ritual Operations*, Eighteenth and Twentieth Meetings, EB23.R75, 2 and 3 February 1959, available at [http://apps.who.int/iris/bitstream/10665/87417/1/EB23R75\\_eng.pdf?ua=1](http://apps.who.int/iris/bitstream/10665/87417/1/EB23R75_eng.pdf?ua=1) [Last Accessed 1 October 2015].

<sup>23</sup> Ibid.

<sup>24</sup> A. Martinez and M.E. Stuart, *Out of the Ivory Tower: Feminist Research for Social Change*, Canadian Scholars’ Press, 2003, p. 125.

<sup>25</sup> K.S. Lee, *Female Genital Mutilation: Multiple-Case Studies of Communication Strategies Against a Taboo Practice*, ProQuest, 2008, p. 35.

<sup>26</sup> A. Rahman and N. Toubia, *Female Genital Mutilation: A Guide to Laws and Policies Worldwide*, Zed Books, 2000, p. 10.

<sup>27</sup> United Nations General Assembly, *Resolution 3520 (XXX) on the World Conference of the International Women’s Year*, A/RES/30/3520, 15 December 1975.

<sup>28</sup> F.A. Althaus, *Female Circumcision: Rite of Passage Or Violation of Rights?*, *International Family Planning Perspectives*, Volume 23, No. 3, September 1997, p. 130.

General of the WHO, Dr. Mahler, addressed the need to “combat taboos, superstitions and practices that are detrimental to the health of women and children, such as female circumcision and infibulations,”<sup>29</sup> although FGM/C was till then not an issue against which the WHO actively campaigned.<sup>30</sup> This changed in 1979 when the Seminar on Traditional Practices Affecting the Health of Women and Children was held in Khartoum, Sudan. It was the first educational seminar addressing the harmful health consequences of FGM/C in an international forum. After the initial reluctance to address the issue of FGM/C, the WHO Regional Office for the Eastern Mediterranean sponsored this seminar that devoted a special two-day discussion to the subject of FGM/C. Among other speakers, Hosken, an American feminist, presented her *Hosken Report: Genital and Sexual Mutilation of Females*,<sup>31</sup> which was the first major comprehensive publication on FGM/C in Africa.<sup>32</sup> This report was influential in persuading the WHO to take action in the field of FGM/C. The Seminar was seen as a breakthrough for the campaign against FGM/C, as the “WHO gave its name and credibility to NGOs and campaigners working directly in the field.”<sup>33</sup> The seminar was significant because it was the first time a formal policy statement in relation to FGM/C was made. The WHO condemned the practice of FGM/C in all its forms and recommended a total eradication of the practice, including when it is performed under appropriate medical or hygienic conditions.<sup>34</sup> Moreover, representatives from countries where FGM/C exists formulated recommendations for governments on measures to be taken to eliminate the practice.<sup>35</sup> It was recommended to establish national commissions for the coordination of activities and intensification of general education in relation to FGM/C.<sup>36</sup> This Seminar is referred to as a “historical triumph of women’s advocates”<sup>37</sup> and a “milestone for international mobilization against FGM.”<sup>38</sup>

Another major step was the Second Regional Conference on the Integration of Women in Development in Lusaka, Zambia, in 1979. During this conference, it was recognized that although traditional practices constitute an important

<sup>29</sup> United Nations Economic Commission for Africa, *Female Circumcision in Africa*, ST/ECA/ATRCW/81/02, 1981, available at <http://repository.uneca.org/bitstream/handle/10855/10048/bib-50678.pdf?sequence=1>. [Last Accessed 1 October 2015].

<sup>30</sup> *Ibid.*, p. 43.

<sup>31</sup> F. Hosken, *The Hosken Report: Genital and Sexual Mutilation of Females*, Women’s International Network News, Lexington, MA, 1994.

<sup>32</sup> See also Chapter III, section 5.1 of this research.

<sup>33</sup> E. Dorkenoo, Combating Female Genital Mutilation: An Agenda for the Next Decade, *World Health Statistics Quarterly*, Volume 49, No. 2, 1996, p. 142.

<sup>34</sup> United Nation Children’s Fund, *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting*, UNICEF Innocenti Research Centre, 2005, p. 16 and World Health Organization, *Traditional Practices Affecting the Health of Women and Children*, WHO/EMRO Technical Publication No. 2, Report of a Seminar, Khartoum, 10-15 February 1979, p. 51-52.

<sup>35</sup> *Ibid.*, p. 4.

<sup>36</sup> United Nations Economic and Social Council, *Report of the Working Group on Traditional Practices Affecting the Health of Women and Children*, Commission on Human Rights, E/CN.4/1986/42, 4 February 1986, para. 80.

<sup>37</sup> A. Rahman and N. Toubia, *Female Genital Mutilation: A Guide to Laws and Policies Worldwide*, Zed Books, 2000, p. 10.

<sup>38</sup> *Ibid.*

element of African culture, “sexual mutilations” have adverse effects on the health of young girls and women and recognized that “health is a fundamental human right of every human being.”<sup>39</sup> The conference condemned “infibulations and other female sexual mutilations”<sup>40</sup> and called upon governments to assist African CSOs to find “solutions to this particular problem.”<sup>41</sup>

After these two important conferences, international attention for FGM/C grew, also because the practice became widely publicized in the Western world.<sup>42</sup> Brennan explained: “The revelation that girls have their genitals excised as part of an ancient cultural practice shocked and angered many in the West who learned about this practice for the first time. This angry reaction resulted in international efforts to eradicate female circumcision.”<sup>43</sup> Heat-up debates about the practice of FGM/C emerged in the early 1980s. Western feminists and human rights activists condemned the practice as fostering a submissive role of women and criticized the UN for failing to address the issue and to take a stance against it.<sup>44</sup> They argued that FGM/C is a form of gender-based violence that could no longer be justified in the name of culture, religion or tradition. However, these feminists and human rights activists provoked negative reactions among practicing communities. Some African women, while trying to eliminate FGM/C in their own way, perceived their efforts as condescending and derogatory toward their culture and criticized feminists for their writings on the topic.<sup>45</sup>

#### 4.4 UN World Conferences on Women

Between 1975 and 1985, three UN sponsored World Conferences on Women took place. The first World Conference of the International Women's Year took place in Mexico City (1975). This conference resulted in the drafting of the CEDAW, which was adopted in 1979 by the UN GA and entered into force in 1981. It was the first international legal instrument to stipulate what constitutes discrimination against women. The World Conference of the United Nations Decade for Women in Copenhagen (1980) and the World Conference to Review and Appraise the Achievements of the UN Decade for Women in Nairobi (1985) were both significant milestones in promoting the human right's perspective on

<sup>39</sup> United Nations, Economic and Social Council, *Report of the Second Regional Conference on the Interpretation of Women in Development, Lusaka (Zambia)*, E/CN.14/744, 3-7 December 1979, p. 26, available at <http://repository.uneca.org/bitstream/handle/10855/10591/Bib-51371.pdf?sequence=1> [Last Accessed 1 October 2015].

<sup>40</sup> *Ibid.*

<sup>41</sup> United Nations Economic and Social Council, *Report of the Working Group on Traditional Practices Affecting the Health of Women and Children*, Commission on Human Rights, E/CN.4/1986/42, 4 February 1986, para. 103.

<sup>42</sup> M.L. Penn, *Overcoming Violence Against Women and Girls: The International Campaign to Eradicate a Worldwide Problem*, Rowman & Littlefield, 2003, p. 4.

<sup>43</sup> K. Brennan, The influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study, *Law & Inequality*, Volume 7, 1989, p. 376.

<sup>44</sup> R. Howard, *Human Rights and Development in Africa: Women's Rights in English-Speaking Sub-Saharan Africa*, Rowman and Littlefield, 1986, p. 202.

<sup>45</sup> D.M. Westley, Female Circumcision and Infibulation in Africa, *Electronic Journal of Africana Bibliography*, Volume 4, 1999, p. 2.

VAW and strengthened the CSOs that were moving to the forefront in the effort to promote the advancement of women.<sup>46</sup> During these three conferences, FGM/C became an issue for discussion.<sup>47</sup>

#### 4.5 UN Sub-Commission for the Prevention of Discrimination and the Protection of Minorities

In 1981, a London-based human rights organization urged the UN to consider the practice of FGM/C after documenting the harmful physical and psychological health consequences in a report.<sup>48</sup> During the seventh session of the Working Group on Slavery of the UN Sub-Commission for the Prevention of Discrimination and the Protection of Minorities, the representative of human rights organization recommended that the information in the report should be brought to the attention of international organizations for their information “so that they might take it into account in their programmes relating to such practices.”<sup>49</sup> The representative was a woman from Ghana who argued that FGM/C was a violation of human rights<sup>50</sup> and should be eliminated, but at the same time she emphasized to pay due consideration to the sensitivity of the topic. She asserted that elimination of the practice should be done gradually “because of the sensitivity of the issue and its roots in traditional culture.”<sup>51</sup> She called upon the UN Sub-Commission to establish a special Working Group to consider FGM/C and other harmful practices. The Working Group on Slavery responded to that call and recommended in 1982 that a study on all aspects of the problem of “female sexual mutilation” should be undertaken with a view to examining all aspects of the problem, including “the current extent and causes of the problem and how it might best be remedied.”<sup>52</sup> In 1983, the Sub-Commission for the Prevention of Discrimination and the Protection of Minorities recommended to establish a working group to carry out a study on FGM/C, which was endorsed by the Commission on Human Rights and the Economic and Social Council.<sup>53</sup>

<sup>46</sup> M.L. Penn, *Overcoming Violence Against Women and Girls: The International Campaign to Eradicate a Worldwide Problem*, Rowman & Littlefield, 2003, p. 6.

<sup>47</sup> K. Brennan, The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study, *Law and Inequality*, Volume 7, 1989, p. 378.

<sup>48</sup> McLean, S., et al, *Female Circumcision, Excision and Infibulation: The Facts and Proposals for Change*, Minority Rights Group, 1985.

<sup>49</sup> B.G. Ramcharan, *The Principle of Legality in International Human Rights Institutions: Selected Legal Opinions*, Martinus Nijhoff Publishers, 1997, p. 183.

<sup>50</sup> K. Brennan, The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study, *Law and Inequality*, Volume 7, 1989, p. 380.

<sup>51</sup> Report of the Working Group on Slavery on its Seventh Session, E/CN.4/Sub.2/486, 1981, para. 17.

<sup>52</sup> United Nations Economic and Social Council, *Report of the UN Sub-Commission for the Prevention of Discrimination and the Protection of Minorities*, E/CN.4/Sub.2/1982/43, 1982, p. 88 and Annex III.

<sup>53</sup> United Nations Economic and Social Council, *Resolution 1983/1*, 31 August 1983.

#### 4.6 Working Group on Traditional Practices Affecting the Health of Women and Children

As a follow-up from the recommendation of the Working Group on Slavery of the UN Sub-Commission for the Prevention of Discrimination and the Protection of Minorities, the Working Group on Traditional Practices Affecting the Health of Women and Children was established in 1984 to investigate and report on FGM/C and other traditional practices (although FGM/C was the main focus). The Sub-Commission nominated Warzazi and Mudawi to serve as experts in the Working Group to carry out the study.<sup>54</sup> The report was completed and presented during the 42<sup>nd</sup> session of the UN Commission on Human Rights in 1986.<sup>55</sup> The report evaluated FGM/C within its own cultural context.<sup>56</sup> The Working Group explored various aspects of FGM/C; including the definition of FGM/C, forms of FGM/C, the age at which FGM/C is carried out, origins and scope, reasons for the practice, practitioners, effects on physical and mental health, evolution of the problem, practicing countries and action taken at the regional, national and international level. The Working Group was reticent on the question whether FGM/C constitutes a violation of human rights. The report described in detail the physical and psychological consequences of FGM/C. According to the Working Group, FGM/C has serious mental and physical consequences for girls and women, "the gravity of which increases with the degree of mutilation."<sup>57</sup> The Working Group also noted that traditional practices are "at variance" with new standards defined by various international instruments relating to human rights.<sup>58</sup> Furthermore, the Working Group concluded that there is unavoidable "incompatibility" between human rights instruments and traditional practices:

"In the light of these principles which today have the force of law, all countries which have ratified the International Covenants on Human Rights and the Convention on the Elimination of All Forms of Discrimination Against Women and which have morally endorsed the principles enunciated in the Universal Declaration of Human Rights and the United Nations Declaration on the Rights of the Child are currently confronted with the incompatibility which exists between these principles and the obligations they assume as States parties to the above-mentioned instruments, and the maintenance of certain traditional practices, especially since these practices have proved prejudicial to the physical and mental health of women and children."<sup>59</sup>

<sup>54</sup> United Nations Economic and Social Council, *Resolution 1984/48*, 13 March 1984; United Nations Economic and Social Council, *Resolution 1984/34*, 24 May 1984; United Nations Economic and Social Council, *Decision 1984/104*, 10 February 1984.

<sup>55</sup> United Nations Economic and Social Council, *Report of the UN Sub-Commission for the Prevention of Discrimination and the Protection of Minorities*, E/CN.4/Sub.2/1982/43, 1982.

<sup>56</sup> K. Brennan, *The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, *Law and Inequality*, Volume 7, 1989, p. 395.

<sup>57</sup> United Nations Economic and Social Council, *Report of the Working Group on Traditional Practices Affecting the Health of Women and Children*, Commission on Human Rights, E/CN.4/1986/42, 4 February 1986, para. 114.

<sup>58</sup> *Ibid*, para. 117.

<sup>59</sup> *Ibid*, para. 118.

The Working Group used evasive language in its report and did not specify which human rights would be “incompatible” with the practice. According to Brennan, the Working Group “engaged in a balancing process which weighed the cultural function of female circumcision against the harmful consequences.”<sup>60</sup>

A couple of years later, the Sub-Commission adopted Resolution 1988/34 in which they determined that harmful traditional practices “violate the rights of women and children.”<sup>61</sup> In the same year, Warzazi was appointed as Special Rapporteur on Traditional Practices Affecting the Health of Women and Children.<sup>62</sup>

#### 4.7 Establishment Inter-African Committee on Traditional Practices

In 1984, the Working Group on Traditional Practices Affecting the Health of Women and Children organized a seminar in Dakar, Senegal, on traditional practices. During this seminar, the FGM/C was condemned as a “health hazard” and as “unnecessary human suffering” that should be eliminated.<sup>63</sup> During this seminar, the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children (IAC) was created. With the support of UNFPA, UNICEF, WHO and the Ministry of Health of Senegal, follow-up was given on the implementation of the recommendations made at the seminar for the prevention and elimination of the practice. In 1985, IAC set up an office in Addis Ababa, Ethiopia. Its objectives are to (i) prevent and eliminate traditional practices that are harmful to or impede the health, human development and rights of women and girls and advocate for care for those who suffer the health consequences of harmful practices; and (ii) promote and support those traditional practices that improve and contribute to the health, human development and rights of women and children.<sup>64</sup> The IAC was mandated to (i) create national committees capable of handling FGM/C in collaboration with governmental bodies; (ii) encourage action-oriented research; (iii) support income-generating activities; (iv) organize workshops and seminars; and to (v) raise funds.<sup>65</sup> Since its establishment in 1985, the IAC has been working on policy programmes and actions to eliminate FGM/C and other harmful practices in the African region. The Committee has established national

<sup>60</sup> United Nations Economic and Social Council, *Report of the Working Group on Traditional Practices Affecting the Health of Women and Children*, Commission on Human Rights, E/CN.4/1986/42, 4 February 1986, p. 389.

<sup>61</sup> United Nations Economic and Social Council, *Resolution 1988/34*, 1 September 1988, preamble.

<sup>62</sup> United Nations Economic and Social Council, *Resolution 1988/57*, 9 March 1988.

<sup>63</sup> United Nations Economic and Social Council, *Report of the Working Group on Traditional Practices Affecting the Health of Women and Children*, Commission on Human Rights, E/CN.4/1986/42, 4 February 1986, para. 87.

<sup>64</sup> For more information, see the website of the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children, available at <http://www.iac-ciaf.net/> [Last Accessed 1 October 2015].

<sup>65</sup> United Nations Economic and Social Council, *Report of the Working Group on Traditional Practices Affecting the Health of Women and Children*, Commission on Human Rights, E/CN.4/1986/42, 4 February 1986, para. 98-101.

committees in 30 countries<sup>66</sup> and have made African governments aware of the harmful effects of FGM/C and other harmful practices affecting the health of women and children.<sup>67</sup> According to UNICEF, the IAC has played a major role at the international level “in ensuring that the practice is raised at international conferences and addressed by legal instruments relating to girls and women.”<sup>68</sup>

#### 4.8 General Recommendation No. 14 on Female Circumcision

In 1990, at its ninth session, the Committee on the Elimination of Discrimination against Women (CEDAWCee) addressed the issue of FGM/C and other practices harmful to the health of women. During this session, the CEDAWCee issued General Recommendation (GR) No. 14 on “Female Circumcision.” The CEDAWCee noted with satisfaction that governments, national women’s organizations, CSOs and bodies of the UN system “remain seized of the issue having particularly recognized that such traditional practices as female circumcision have serious health and other consequences for women and children.” The CEDAWCee referred to cultural, traditional and economic pressures as contributing toward the continuation of harmful practices. The CEDAWCee did not explicitly classify FGM/C as a human rights violation, but the Committee expressed its concern about the continuation of FGM/C and other traditional practices, which are “harmful to the health of women.” GR No. 14 included detailed recommendations for States Parties to take further action with a view to eradicating the practice.<sup>69</sup>

#### 4.9 Vienna Declaration and Programme of Action

The issue of harmful practices was again addressed during the World Conference on Human Rights in Vienna in 1993. The concluding document, the Vienna Declaration and Programme of Action does not make specific mention of the practice of FGM/C, but focused on the broad category “traditional or customary practices.”<sup>70</sup> The World Conference on Human Rights stressed the importance of “working towards the elimination of violence against women in public and private life”<sup>71</sup> and the eradication of any conflicts that may arise between the rights of women and the harmful effects of traditional practices.<sup>72</sup> The document proclaimed gender-based violence a human rights issue, by stating that “gender-based violence and all forms of sexual harassment and

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<sup>66</sup> See the website of the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children, available at [http://www.iac-ciaf.net/index.php?option=com\\_content&view=article&id=24&Itemid=12](http://www.iac-ciaf.net/index.php?option=com_content&view=article&id=24&Itemid=12) [Last Accessed 1 October 2015].

<sup>67</sup> F.A. Althaus, Female Circumcision: Rite of Passage Or Violation of Rights?, *International Family Planning Perspectives*, Volume 23, No. 3, September 1997, p. 1.

<sup>68</sup> United Nations Children’s Fund, *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting*, UNICEF Innocenti Research Centre, 2005, p. 16.

<sup>69</sup> These recommendations will be discussed in detail in section 7 of this chapter.

<sup>70</sup> United Nations General Assembly, *Vienna Declaration and Programme of Action*, A/CONF.157/23, 12 July 1993, para. 38 and 49.

<sup>71</sup> *Ibid.*, para. 38.

<sup>72</sup> *Ibid.*



exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated.”<sup>73</sup> The Vienna Conference thus expanded the human rights agenda to include gender-based violence, but only implicitly stated that traditional or customary practices are considered gender-based violence and consequently a human rights violation.

#### 4.10 Declaration on the Elimination of Violence Against Women

Half a year after the Vienna Conference, the UN GA adopted the UN Declaration on the Elimination of Violence Against Women (DEVAW).<sup>74</sup> Although not legally binding, it provides a set of international standards to address the problem of VAW. This declaration became the first (and to-date it remains the only) international human rights instrument explicitly addressing VAW. The GA stressed its concern that VAW is an “obstacle to the achievement of equality, development and peace.”<sup>75</sup> The Preamble to the Declaration recognizes that VAW is a manifestation of “historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women.”

Unlike the Working Group on Traditional Practices Affecting the Health of Women and Children and the Vienna Declaration and Programme of Action that used implicit language by explaining that “traditional practices” are “incompatible” with human rights standards, the DEVAW explicitly addressed “female genital mutilation” and stated that the practice is a form of VAW and that VAW constitutes a violation of the rights and fundamental freedoms of women.<sup>76</sup>

Article 1 of DEVAW provides a definition of the term VAW:

“For the purposes of this Declaration, the term “violence against women” means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”

In Article 2(a) of the DEVAW, FGM/C is explicitly identified as a form of VAW:

“Violence against women shall be understood to encompass, but not be limited to, the following: (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.”

<sup>73</sup> United Nations General Assembly, *Vienna Declaration and Programme of Action*, A/CONF.157/23, 12 July 1993, para. 18.

<sup>74</sup> United Nations General Assembly, *Declaration on the Elimination of Violence against Women*, A/RES/48/104, 20 December 1993.

<sup>75</sup> *Ibid*, preamble.

<sup>76</sup> *Ibid*.

It is remarkable that, for the first time, new language is used to refer to the practice. While the term “female circumcision” was used in GR 14, the DEVAW adopted the term “female genital mutilation”, specifically condemning the practice. Although the DEVAW is not legally binding, the inclusion of FGM/C as a form of VAW aligned the international campaign against FGM/C with the global movement against VAW. Apart from defining VAW, the DEVAW also codified steps that States, UN agencies and UN organs should take to address VAW.<sup>77</sup>

#### 4.11 General Recommendation No. 19 on Violence Against Women

Although adopted a year earlier than the DEVAW, GR No. 19 on VAW<sup>78</sup> of the CEDAWCee became applicable to the practice of FGM/C only after the adoption of the DEVAW, since FGM/C was only then formally identified as a form of VAW. GR No. 19 explicitly states that gender-based violence<sup>79</sup> is a form of gender discrimination (within the meaning of Article 1 CEDAW) that impairs or nullifies women’s enjoyment of human rights and fundamental freedoms under international law.<sup>80</sup> Furthermore, a definition of gender-based violence is provided in GR No. 19 and reads as follows: “violence that is directed against a woman because she is a woman or that affects women disproportionately.”<sup>81</sup> Gender-based violence includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.<sup>82</sup> The human rights that are being violated with gender-based violence are listed in GR No. 19, which are the following: (a) the right to life; (b) the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; (c) the right to equal protection according to humanitarian norms in time of international or internal armed conflict; (d) the right to liberty and security of person; (e) the right to equal protection under the law; (f) the right to equality in the family; (g) the right to the highest standard attainable of physical and mental health; and (h) the right to just and favourable conditions of work.<sup>83</sup> The CEDAWCee explicitly states that gender-based violence may breach specific provisions of the convention, “regardless of whether those provisions expressly mention violence.”<sup>84</sup>

<sup>77</sup> These recommendations will be discussed in detail in section 7 of this chapter.

<sup>78</sup> United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence Against Women*, 1992.

<sup>79</sup> The terms “gender-based violence” and “violence against women” were used interchangeably in CEDAW General Recommendation No. 19.

<sup>80</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences on Intersections between Culture and Violence Against Women*, A/HRC/4/34, 17 January 2007, para. 28.

<sup>81</sup> United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence Against Women*, 1992, para. 6.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*, para. 7.

<sup>84</sup> *Ibid.*, para. 6.

## 4.12 Programme of Action of the International Conference on Population and Development

In 1994, the UN organized the International Conference on Population and Development (ICPD) that was held in Cairo. The main objective of the ICPD was to emphasize the direct links between reproductive health and human rights.<sup>85</sup> The concluding document, the Programme of Action on Population and Development<sup>86</sup> recognized that VAW is a widespread phenomenon. More specifically, the Programme of Action acknowledged that in a number of countries, “harmful practices meant to control women’s sexuality have led to great suffering.”<sup>87</sup> Unlike the concluding documents of the Vienna Conference, in the Cairo Programme of Action “female genital mutilation” is specifically mentioned. The practice was considered a “violation of basic human rights and a major lifelong risk to women’s health.”<sup>88</sup> In addition, governments and communities are advised to “urgently take steps”<sup>89</sup> in order to stop the practice and to prohibit it “wherever it exists.”<sup>90</sup> Governments should protect women and girls from “all such similar unnecessary and dangerous practices.”<sup>91</sup> Specific recommendations were made in relation to the steps to be taken in relation to the elimination of FGM/C.<sup>92</sup>

## 4.13 Beijing Declaration and Platform of Action

During the Fourth World Conference on Women, held in Beijing in 1995, the human rights implications of “female genital mutilation” were again addressed. The Beijing Declaration and Platform of Action stated that the practice had harmful effects and pose “grave health risks”<sup>93</sup> on girls. Consistent with the DEVAW, the definition of VAW as set out in Article 1 of the DEVAW was restated during the Beijing Conference. FGM/C was again categorized as a form of VAW.<sup>94</sup> The Beijing Declaration reiterated that VAW “both violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms.”<sup>95</sup> In addition, the Beijing Declaration stated: “Any harmful aspect of certain traditional, customary or modern practices that violates the rights of women should be prohibited and eliminated.”<sup>96</sup> States

<sup>85</sup> UN Office of the High Commissioner for Human Rights, *Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children*, August 1995, No. 23, available at <http://www.refworld.org/docid/479477410.html> [Last Accessed 1 October 2015].

<sup>86</sup> United Nations Population Fund, *Report of the International Conference on Population and Development*, Cairo, A/CONF.171/13/Rev.1, 5-13 September 1994.

<sup>87</sup> *Ibid.*, para. 7.35.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*, para. 7.40.

<sup>90</sup> *Ibid.*, para. 4.22

<sup>91</sup> *Ibid.*, para. 7.40.

<sup>92</sup> These recommendations will be discussed in detail in section 7 of this chapter.

<sup>93</sup> United Nations, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 27 October 1995, para. 93.

<sup>94</sup> *Ibid.*, para. 113 and 113(a).

<sup>95</sup> *Ibid.*, para. 224.

<sup>96</sup> *Ibid.*

were urged to take action to combat and eliminate all forms of VAW.<sup>97</sup> The Beijing Declaration recommended governments to “prohibit female genital mutilation wherever it exists and give vigorous support to efforts among non-governmental and community organizations and religious institutions to eliminate such practices.”<sup>98</sup> In addition, one of the strategic objectives of the Platform for Action was to eliminate negative cultural attitudes and practices against girls.<sup>99</sup> The Beijing Declaration also called upon governments to take action against FGM/C and made specific recommendations in relation to the actions to be taken in relation to the elimination of FGM/C.<sup>100</sup>

#### 4.14 Joint Statement WHO, UNICEF and UNFPA

In 1997, the WHO, UNICEF and UNFPA issued a Joint Statement on “Female Genital Mutilation.”<sup>101</sup> The Statement started off by stating that FGM/C is a deeply rooted practice that has severe health consequences for girls and women.<sup>102</sup> In addition, they explain that their arguments against FGM/C “are based on universally recognized human rights, including the rights to integrity of the person and the highest attainable level of physical and mental health.”<sup>103</sup> The agencies argue that FGM/C is “universally unacceptable” because it is an infringement on the physical and psychosexual integrity of women and girls.<sup>104</sup> The Statement describes the implications of FGM/C on public health and declared support for the elimination of the practice.

In 2008, a new Joint Statement on “Female Genital Mutilation”<sup>105</sup> was issued, this time written and signed by ten UN agencies instead of three. Based on new evidence and lessons learned, this Interagency Statement highlights the “wide recognition of the human rights and legal dimensions of the problem.”<sup>106</sup> The document stresses the common commitment of these agencies to continue working towards the elimination of FGM/C. The Interagency Statement clearly clarified that FGM/C is a dangerous practice and a “critical human rights issue.”<sup>107</sup> The Statement identified that the following human rights are being violated by FGM/C: (i) the right to be free from gender-discrimination; (ii) the right to life; (iii) the right to the highest attainable standard of health; (iv) the right to freedom from torture or cruel, inhuman or degrading treatment or punishment; and (v) the rights of the child.<sup>108</sup>

<sup>97</sup> United Nations, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 27 October 1995, para. 224.

<sup>98</sup> *Ibid.*, para. 232(h).

<sup>99</sup> *Ibid.*, para. 276-277.

<sup>100</sup> These recommendations will be discussed in detail in section 7 of this chapter.

<sup>101</sup> World Health Organization, *Female Genital Mutilation: A Joint WHO/UNICEF/UNFPA Statement*, WHO Library, 1997.

<sup>102</sup> *Ibid.*, p. 1.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008.

<sup>106</sup> *Ibid.*, p. 3.

<sup>107</sup> *Ibid.*, p. 21.

<sup>108</sup> World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008, p. 1 and p. 9.

## 5 UNIVERSALITY OF HUMAN RIGHTS

The practice of FGM/C stands at the crossroads of two schools of thought as regards the applicability and interpretation of human rights: universalism and cultural relativism. There are strong proponents of both doctrines in relation to cultural practices in general and FGM/C in particular.

As the previous section showed, the WHO was reluctant and refused to take action in the field of FGM/C in the 1950s. The WHO invoked “culture” as a justification for non-involvement in the practice.<sup>109</sup> The WHO and other international organizations gradually changed their approach in the following decennia, mainly due to increased knowledge of the (health consequences of the) practice. International organizations moved from claiming that the practice “incompatible” with human rights standards, to a classification of FGM/C as a form of gender-based violence and an act of VAW. As Jain explains: “First, “customs” were viewed as barbaric, then “barbaric” became “violence against women,” and finally “violence against women” became “rights violations.””<sup>110</sup>

International organizations struggled with the fact that the practice of FGM/C was representing an ethical dilemma: Who, if anyone, has the moral authority to condemn FGM/C?<sup>111</sup> Is it appropriate for international organizations to criticize a longstanding cultural tradition that conflicts with its established human rights norms?<sup>112</sup>

As the previous section showed, the UN took in the 1990s a clear universalistic stance in relation to FGM/C. They condemned FGM/C, considered the practice unacceptable, and classified the practice as a human rights violation under international law. However, a highly debated issue is the role that international human rights law should play in addressing a practice that is strongly anchored in cultural beliefs and norms.<sup>113</sup> Some critics argue that FGM/C should not be considered a clear-cut violation of basic human rights, but should be regarded as an expression of one people’s culture and identity in which the international community should not interfere.

### 5.1 Human rights a Western concept?

Ever since the adoption of the UDHR, cultural relativists expressed hesitation by fully adopting a UN human rights system and challenged the universal

<sup>109</sup> N. Berkovitch and K. Bradley, *The Globalization of Women’s Status: Consensus/Dissensus in the World Polity, Sociological Perspectives*, Volume 42, No. 3, 1999, p. 491.

<sup>110</sup> P.D. Jain, *Women, Development, and the UN: A Sixty-Year Quest for Equality and Justice*, United Nations Intellectual History Project Series, Indiana University Press, 2005, p. 28.

<sup>111</sup> B. Shell-Duncan and Y. Hernlund, *Female “Circumcision” in Africa: Culture, Controversy and Change*, Lynne Rienner, 2000, p. 25; R.M. Abusharaf, *Revisiting Feminist Discourses on Infibulation: Responses from Sudanese Feminists*, in: B. Shell-Duncan and Y. Hernlund, *Female “Circumcision” in Africa: Culture, Controversy and Change*, Lynne Rienner, 2000, p. 155.

<sup>112</sup> K. Brennan, *The influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, *Law & Inequality*, Volume 7, 1989, p. 376.

<sup>113</sup> Center for Reproductive Rights, *Female Genital Mutilation, A Matter of Human Rights: An Advocate’s Guide to Action*, New York, 2006, p. 5.

validity of human rights norms.<sup>114</sup> According to Brennan, cultural relativism is the theory that “there is infinite cultural diversity and that all cultural practices are equally valid.”<sup>115</sup> The critique of cultural relativists is that the concept of human rights is a Western philosophy and ideology. Cultural relativists assert that the human rights doctrine is firmly rooted in Western political liberalism and individualism<sup>116</sup> and their concern is that Western values or norms are imposed on other societies, particularly in third world countries, which they refer to as “cultural imperialism” or “Western moral imperialism.”<sup>117</sup> No culture is, according to relativists, superior to another and therefore one needs to have respect for other traditions and practices that are not the “majority” culture’s traditions. In other words: universal rights do simply not exist, due to the wide variety of cultures and ethnic groups in the world. Cultural relativists urge the “need for tolerance and respect of all cultures”<sup>118</sup> and argue that cultural behaviour should be judged only through cultural specific, rather than universal norms and values.<sup>119</sup> They argue that there is no universal standard, since cultures vary in what they accept and/or prohibit. The meaning of human rights depends, according to relativists, upon the specific cultural context.<sup>120</sup> Cultural relativists assert that FGM/C has a legitimate function indigenous to the culture. Although FGM/C is “wrong” according to Western standards, it may be permissible according to the values of other societies, they argue. Therefore, judging the practice of FGM/C according to international human right norms is, according to cultural relativists, incorrect.<sup>121</sup> Universalists counter this argument by arguing that human rights standards must apply across national, cultural and political boundaries in order to have force and meaning.<sup>122</sup>

<sup>114</sup> P.D. Mitchum, Slapping the Hand of Cultural Relativism: Female Genital Mutilation, Male Dominance, and Health as a Human Rights Framework, *William & Mary Journal of Women and the Law*, Volume 19, No. 3, 2013, p. 605.

<sup>115</sup> K. Brennan, The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study, *Law and Inequality*, Volume 7, 1989, p. 370.

<sup>116</sup> M.W. Mutua, *Politics and Human Rights: An Essential Symbiosis*, in: M. Byers, *The Role of Law in International Politics – Essays in International Relations and International Law*, Oxford University Press, 2000.

<sup>117</sup> A.A. Oba, Female Circumcision as Female Genital Mutilation: Human Rights or Cultural Imperialism?, *Global Jurist*, Volume 8, No. 3, 2008, p. 1.

<sup>118</sup> S. Deller Ross, *Women’s Human Rights: The international and Comparative Law Casebook*, University of Pennsylvania Press, 2008, p. 461.

<sup>119</sup> H. Lewis, Between Irua and “Female Genital Mutilation”: Feminist Human Rights Discourse and the Cultural Divide, *Harvard Human Rights Journal*, Volume 8, 1995, p. 17.

<sup>120</sup> L.A. Trueblood, Female Genital Mutilation: A Discussion of International Human Rights Instruments, Cultural Sovereignty and Dominance Theory, *Denver Journal of International Law and Policy*, Volume 28, No. 4, 1999-2000, p. 438.

<sup>121</sup> K. Brennan, The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study, *Law and Inequality*, Volume 7, 1989, p. 368.

<sup>122</sup> L.C.G. Irvine, Ending Female Genital Cutting: How Have Various Approaches Attempted to Address the Cultural Significance of the Practice and its Impacts upon Women’s Bodies?, *Polis Journal*, Volume 5, 2011, p. 2.

## 5.2 Universalistic stance of the UN

The UN has taken a strong universalistic stance, which was already evident with the adoption of the UDHR. The GA proclaimed the UDHR as “a common standard of achievement for all peoples and all nations.”<sup>123</sup> Also in relation to VAW, the universalistic approach of the UN was already mirrored in early human rights instruments, such as the Vienna Declaration and Programme of Action (1993), the DEVAW (1993), the International Conference on Population and Development (1994) and the Beijing Declaration and Platform for Action (1995).<sup>124</sup> All these conference documents emphasized: “the human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights.”<sup>125</sup> The DEVAW recognized the “urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human beings.”<sup>126</sup> More specifically, the Vienna Declaration and Programme of Action claimed that the universal nature of human rights is “beyond question”:

“The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question.”<sup>127</sup>

In addition to this statement, the Vienna Declaration further explained that:

“While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”<sup>128</sup>

<sup>123</sup> United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, preamble.

<sup>124</sup> N. Berkovitch and K. Bradley, *The Globalization of Women's Status: Consensus/Dissensus in the World Polity*, *Sociological Perspectives*, Volume 42, No. 3, 1999, p. 491.

<sup>125</sup> United Nations General Assembly, *Vienna Declaration and Programme of Action*, A/CONF.157/23, 12 July 1993, para. 18; United Nations Population Fund, *Report of the International Conference on Population and Development*, Cairo, A/CONF.171/13/Rev.1, 5-13 September 1994, Principle 4; United Nations, *Beijing Declaration and Platform of Action*, adopted at the Fourth World Conference on Women, 27 October 1995, para. 2.

<sup>126</sup> United Nations General Assembly, *Declaration on the Elimination of Violence Against Women*, A/RES/48/104, 20 December 1993, preamble.

<sup>127</sup> United Nations General Assembly, *Vienna Declaration and Programme of Action*, A/CONF.157/23, 12 July 1993, para. 1.

<sup>128</sup> *Ibid*, para. 5.

### 5.3 Cultural relativist stance

#### 5.3.1 *The right to culture, minority rights and the right to religious freedom*

Supporters of FGM/C justify the practice on grounds of culture, the rights of minorities and the right to religious freedom.<sup>129</sup> These rights have also been recognized in human rights instruments and documents.

In the first place, supporters of FGM/C invoke the right to enjoy one's culture or to take part in cultural life. They see efforts to eliminate FGM/C as efforts that are threatening their culture. Article 27(1) of the UDHR guarantees for example the right to "freely participate in the cultural life of the community."<sup>130</sup> Similar provisions can be found in the ICESCR,<sup>131</sup> the ACHPR,<sup>132</sup> the Vienna Declaration and Programme of Action,<sup>133</sup> the UNESCO Declaration of the Principles on International Cultural Co-operation,<sup>134</sup> and the Declaration on Race and Racial Prejudice.<sup>135</sup> In the African context, the ACHPR describes in Article 29(7) that the individual shall have the duty "to preserve and strengthen positive African cultural values."

In the second place, supporters of FGM/C invoke minority rights, because the communities that practice FGM/C belong in many countries to a minority group.<sup>136</sup> They can see the decision of the majority to eliminate FGM/C as an infringement upon the autonomy of the minority group. Protection for minorities can be found for example in the ICCPR, which explains in Article 27: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."<sup>137</sup> Similar provisions can be found in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.<sup>138</sup>

In the third place, supporters of FGM/C often consider FGM/C a religious act. As explained in Chapter III of this thesis, in many countries there is a widespread view that FGM/C is a religious duty (although no religious text

<sup>129</sup> A. Rahman and N. Toubia, *Female Genital Mutilation: A Guide to Laws and Policies Worldwide*, Zed Books, 2000, p. 31.

<sup>130</sup> United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, Article 27(1).

<sup>131</sup> United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, Volume 993, p. 9, Article 15(1)(a).

<sup>132</sup> Organization of African Unity, *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981, Article 17(2), 22(1) and 29(7).

<sup>133</sup> United Nations General Assembly, *Vienna Declaration and Programme of Action*, A/CONF.157/23, 12 July 1993, para. 20.

<sup>134</sup> United Nations Educational, Scientific and Cultural Organization, *Declaration of Principles of International Cultural Co-operation*, 4 November 1966, Article 1(1).

<sup>135</sup> United Nations Educational, Scientific and Cultural Organization, *Declaration on Race and Racial Prejudice*, 27 November 1978, Article 5.

<sup>136</sup> A. Rahman and N. Toubia, *Female Genital Mutilation: A Guide to Laws and Policies Worldwide*, Zed Books, 2000, p. 34.

<sup>137</sup> United Nations General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, Volume 999, p. 179, Article 27.

<sup>138</sup> United Nations General Assembly, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, A/RES/47/135, 3 February 1993, Article 2.



prescribes the practice). The right to religious freedom is an important human right and protected by many human rights instruments and documents. Article 18(1) of the ICCPR reads for example as follows: “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.” Similar provisions can be found in the UDHR,<sup>139</sup> the ACHPR<sup>140</sup> and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.<sup>141</sup>

### 5.3.2 *Conflicting human rights*

The question is how these three rights have to be viewed in light of the elimination of FGM/C. It seems that a conflict arises between on the one hand the right to be free from gender-discrimination, the right to life, the right to the highest attainable standard of health, the right to freedom from torture or cruel, inhuman or degrading treatment or punishment and the rights of the child; and on the other hand the right to culture, minority rights and the right to religious freedom.

The human rights framework itself provides guidance on how to deal with these conflicting rights. The right to culture, the rights of minorities and the right to religious freedom are not absolute and the human rights framework recognizes prescribed limitations of these rights. Article 30 of the UDHR claims for example that “Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”<sup>142</sup> Both the ICCPR and the ICESCR have a similar general clause in Article 5(1). This overall restriction ensures that no one may invoke a right recognized in these treaties to infringe upon (other) human rights and fundamental freedoms guaranteed by international law.<sup>143</sup> For example, in relation to the right to religious freedom, the ICCPR provides in Article 18(3) that this right may be subject to limitations that are “prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” Thus, the right to religious freedom is limited by State’s duty to protect public health and the fundamental rights and freedoms of others.

<sup>139</sup> United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, Article 18.

<sup>140</sup> Organization of African Unity, *African Charter on Human and Peoples’ Rights* (“Banjul Charter”), 27 June 1981, Article 8.

<sup>141</sup> United Nations General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, A/RES/36/55, 25 November 1981, Article 1(1).

<sup>142</sup> United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, Article 30.

<sup>143</sup> United Nations Educational, Scientific and Cultural Organization, *Universal Declaration on Cultural Diversity*, 2 November 2001, Article 4.

**Table 4.1 Conflicting human rights**

Human rights invoked against FGM/C	Human rights invoked in favour of FGM/C
Right to be free from gender-discrimination	Right to culture
Right to life	Minority rights
Right to health	Right to religious freedom
Right not to be subjected to torture	
Rights of the child	

#### 5.4 Invoking custom, tradition or religious consideration?

According to Ertürk, the UN Special Rapporteur on violence against women, its causes and consequences [hereinafter “Special Rapporteur on VAW”] the invocation of cultural relativist arguments by States for ignoring VAW in general and FGM/C in particular is one of the “major obstacles” to the implementation of women’s rights.<sup>144</sup> However, since the 1990s, the UN clearly rejected cultural relativist claims that seek to justify or condone VAW. The DEVAW made a strong claim against cultural relativism in the context of VAW. Under Article 4 of the DEVAW, States are required to refrain from invoking “any custom, tradition or religious consideration”<sup>145</sup> to avoid their obligations with respect to the elimination of VAW. The DEVAW also urged States to adopt measures, especially in the field of education, in order to “modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women.”<sup>146</sup> Reference to Article 4 of the DEVAW can be found in many other human rights documents, including, amongst others, the Beijing Declaration and Platform for Action,<sup>147</sup> UN GA Resolutions,<sup>148</sup> reports of the Special Rapporteur on VAW,<sup>149</sup> and documents of the CSW.<sup>150</sup>

<sup>144</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences on Intersections between Culture and Violence Against Women*, A/HRC/4/34, 17 January 2007, p. 3.

<sup>145</sup> United Nations General Assembly, *Declaration on the Elimination of Violence Against Women*, A/RES/48/104, 20 December 1993, Article 4.

<sup>146</sup> *Ibid.*, Article 4(j).

<sup>147</sup> United Nations, *Beijing Declaration and Platform of Action*, adopted at the Fourth World Conference on Women, 27 October 1995, para. 124(a).

<sup>148</sup> United Nations General Assembly, *Resolution 61/143 on the Intensification of Efforts to Eliminate all Forms of Violence Against Women*, A/RES/61/143, 30 January 2007, para. 5; United Nations General Assembly, *Resolution 63/155 on Intensification of Efforts to Eliminate all Forms of Violence Against Women*, A/RES/63/155, 30 January 2009, para. 9.

<sup>149</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences on Intersections between Culture and Violence Against Women*, A/HRC/4/34, 17 January 2007, para. 29-30; United Nations Human Rights Council, *Report of the*

## 6 HUMAN RIGHTS VIOLATED BY FGM/C

The Interagency Statement on the elimination of FGM/C<sup>151</sup> clarified that FGM/C is a harmful practice and a “violation of the human rights of girls and women.”<sup>152</sup> The Statement recognized that FGM/C violates a number of well-established human rights protected by international and regional human rights instruments. More specifically, the Statement refers to the right to be free from gender-discrimination (section 6.1); the right to life (section 6.2); the right to the highest attainable standard of health (section 6.3); the right to freedom from torture or cruel, inhuman or degrading treatment or punishment (section 6.4); and the rights of the child (section 6.5).<sup>153</sup> Below, these five human rights will be shortly addressed in order to provide an understanding on why and how these human rights can be at stake in relation to the practice of FGM/C and in which human rights instruments these rights are enshrined.

### 6.1 The right to be free from gender discrimination

In the first place, the practice of FGM/C constitutes a form of gender-based discrimination and hampers women’s enjoyment of human rights on an equal footing with men. According to the Interagency Statement, FGM/C has been recognized as a form of discrimination based on sex because “it is rooted in gender inequalities and power imbalances between men and women and inhibits women’s full and equal enjoyment of their human rights.”<sup>154</sup>

Article 1 of the CEDAW defines “discrimination against women” as:

“Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

FGM/C fits within this definition and can be seen as a form of gender discrimination on the basis of sex. In the first place, the practice is exclusively directed towards women and girls. In the second place, it has the effect of impairing or nullifying women and girls’ enjoyment of human rights.<sup>155</sup> The practice of FGM/C carries a fundamental discriminatory belief of the subordinate role of women and girls in society. The previous chapter showed that arguments justifying the practice are based on perceptions of women as

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*Special Rapporteur on Violence Against Women, Its Causes and Consequences on Indicators on Violence Against Women and State Response*, A/HRC/7/6, 29 January 2008, para. 5.

<sup>150</sup> United Nations Economic and Social Council, *Report on the Fifty-Seventh Session (4-15 March 2013)*, E/2013/27 and E/CN.6/2013/11, 2013, para. 14.

<sup>151</sup> World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008.

<sup>152</sup> *Ibid.*, p. 8.

<sup>153</sup> *Ibid.*, p. 1 and p. 9.

<sup>154</sup> *Ibid.*, p. 10.

<sup>155</sup> A. Rahman and N. Toubia, *Female Genital Mutilation: A Guide to Laws and Policies Worldwide*, Zed Books, 2000, p. 21.

inferior, since the intention of FGM/C is to control women's sexuality and to reduce women's sexual desire.<sup>156</sup> The practice reflects deep-rooted inequality between men and women. According to Coomaraswamy, Special Rapporteur on VAW, FGM/C is a result of "the patriarchal power structures, which legitimize the need to control women's lives."<sup>157</sup> Furthermore, she explains: "it arises from the stereotypical perception of women as the principal guardians of sexual morality, but with uncontrolled sexual urges."<sup>158</sup> The prohibition of gender discrimination is a fundamental principle of human rights law and supported in various international and regional human rights instruments (see table 4.2 below).

## 6.2 The right to life

FGM/C can also bring the right to life into bearing in the most extreme cases when a girl dies when undergoing the procedure. Uncontrolled and excessive bleeding can lead to hemorrhagic shock, neurogenic shock as a result of pain and trauma. Infection after the procedure can be severe enough to cause death of the girl undergoing FGM/C.<sup>159</sup> In addition, FGM/C may also contribute or cause maternal mortality<sup>160</sup> as well as early neo-natal death, as a consequence of a tight infibulations or other FGM/C-related problem.<sup>161</sup> As explained in chapter III,<sup>162</sup> there is no data available on the mortality rate of women and girls undergoing FGM/C.<sup>163</sup> Complications of FGM/C resulting in death may not be recognized and are rarely reported as such, since they might be attributed to other causes (including medical causes, but may also reflect traditional beliefs attributed to supernatural causes).<sup>164</sup> The right to life is considered a core human right and protected by a number of international and regional instruments (see table 4.2 below).

## 6.3 The right to the highest attainable standard of health

FGM/C can also constitute an infringement of the right to the enjoyment of the highest attainable standard of physical and mental health.<sup>165</sup> As described in chapter III of this thesis, the practice of FGM/C can cause serious adverse

<sup>156</sup> See Chapter III, section 3.9.2 of of this research.

<sup>157</sup> United Nations Commission on Human Rights, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences on Cultural practices in the Family that are Violent towards Women*, E/CN.4/2002/83, 31 January 2002, para. 14.

<sup>158</sup> Ibid.

<sup>159</sup> United Nations Children's Fund, *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting*, UNICEF Innocenti Research Centre, 2005, p. 16.

<sup>160</sup> Ibid.

<sup>161</sup> Human Rights Watch, *They Took Me and Told Me Nothing, Female Genital Mutilation in Iraqi Kurdistan*, June 2010, p. 37.

<sup>162</sup> See Chapter III, section 8.1 of this research.

<sup>163</sup> D. Reisel and S.M. Creighton, Long Term Health Consequences of Female Genital Mutilation (FGM), *Maturitas*, Volume 80, No. 1, 2015, p. 48-51.

<sup>164</sup> United Nations Children's Fund, *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting*, UNICEF Innocenti Research Centre, 2005, p. 16.

<sup>165</sup> World Health Organization, *World Health Assembly Resolution on Female Genital Mutilation*, WHA61.16, 24 May 2008, preamble.

immediate health consequences (section 8.1), long-term health consequences (section 8.2), as well as psychological, social and sexual consequences (section 8.3). The UN GA reaffirmed in their latest Resolution that “female genital mutilations are a harmful practice that constitutes a serious threat to the health of women and girls, including their psychological, sexual and reproductive health, which can increase their vulnerability to HIV and may have adverse obstetric and prenatal outcomes as well as fatal consequences for the mother and the newborn.”<sup>166</sup> Hunt, the UN Special Rapporteur on the right to everyone to the enjoyment of the highest attainable standard of physical and mental health [hereinafter “Special Rapporteur on the right to health”] stated in his report that “Rape and other forms of sexual violence, including [...] female genital mutilation/cutting (FGM/C), [...] all represent serious breaches of sexual and reproductive freedoms, and are fundamentally and inherently inconsistent with the right to health.”<sup>167</sup> Subjecting a girl or woman to health risks, in the absence of medical necessity, is a violation of the right to health.<sup>168</sup> The right to health is protected in various international and regional human rights instruments (see table 4.2 below).

#### 6.4 The right not to be subjected to torture, inhuman or degrading treatment or punishment

The international community considers the practice of FGM/C a form of torture, cruel, inhuman and degrading treatment. However, the classification of FGM/C as torture is quite complex.<sup>169</sup> Article 1(1) of the CAT defines “torture” as:

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

<sup>166</sup> United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, preamble.

<sup>167</sup> United Nations Economic and Social Council, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, E/CN.4/2004/49, 16 February 2004, para. 25.

<sup>168</sup> A. Rahman and N. Toubia, *Female Genital Mutilation, A Guide to Laws and Policies Worldwide*, Zed Books, 2000, p. 28.

<sup>169</sup> A.N. Wood, A Cultural Rite of Passage or a Form of Torture: Female Genital Mutilation from an International Law Perspective, *Hastings Women’s Law Journal*, Volume 12, No. 2, 2001, p. 347-386; C. Chinkin, Torture of the Girl Child, in: G. van Bueren, *Childhood Abused: Protecting Children against Torture, Cruel, Inhuman and Degrading Treatment and Punishment*, Ashgate, 1998, p. 99; Amnesty International and Redress, *Gender and Torture Conference Report*, IOR 50/001/2011, 2011, p. 33, available at <http://www.redress.org/downloads/publications/GenderandTortureConferenceReport-191011.pdf> [Last Accessed 1 October 2015].

The definition of torture consists of three elements: (i) severe pain or suffering; (ii) intentional infliction; and (iii) the consent or acquiescence of a public official.

The first element is the “severity of the pain and suffering.” As stipulated in Chapter III, FGM/C can lead to severe immediate and long-term health consequences, as well as to severe psychological, social and sexual consequences. According to Nowak, UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment [hereinafter “Special Rapporteur on torture”], the pain inflicted by FGM/C “does not stop with the initial procedure, but often continues as ongoing torture throughout a woman’s life.”<sup>170</sup> FGM/C can also lead to death shortly after the practice is performed or at the time when the woman is giving birth. However, the complications and health consequences depend on the type of FGM/C performed, the expertise of the practitioner, the conditions under which it is performed, the amount of resistance and the general health condition of the girl or woman who undergoes the procedure.<sup>171</sup> It could for example be argued that the ‘lightest’ form of FGM/C does not amount to ‘severe pain and suffering’ and then this first element is not fulfilled.

The second element is the “intentionally infliction [...] for any reason based on discrimination of any kind.” Contrary to the WHO, the UNHCR included the “intention” in their definition of FGM/C and defines the practice as a procedure that “intentionally alter or cause injury to the female genital organs for non-medical reasons.”<sup>172</sup> The question is whether parents and cutters have an intention to harm. As explained in the previous chapter, the intent of parents is not to harm their child, but they want to do what is best for their daughters.<sup>173</sup> As explained in Chapter III, loving parents subject their daughter to FGM/C in order to secure their acceptance in society and to provide them with many social and cultural benefits – and they may therefore not recognize the (discriminating) implications of FGM/C.<sup>174</sup> However, the element of “intent” is not subjective, but rather objective, since the Committee against Torture (CAT/C) emphasized in its General Comment (GC) No. 2 that: “the elements of intent and purpose in article 1 do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances.”<sup>175</sup> Nowak, UN Special Rapporteur on torture, explains: “like torture, female genital mutilation (FGM) involves the deliberate

<sup>170</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/HRC/7/3, 15 January 2008, para. 51.

<sup>171</sup> See Chapter III, section 8; United Nations Population Fund, *A Holistic Approach to the Abandonment of Female Genital Mutilation/Cutting*, UNFPA, 2007, p. 4, available at [http://www.unfpa.org/sites/default/files/pub-pdf/726\\_filename\\_fgm.pdf](http://www.unfpa.org/sites/default/files/pub-pdf/726_filename_fgm.pdf) [Last Accessed 1 October 2015].

<sup>172</sup> United Nations High Commissioner for Refugees, *Too Much Pain: Female Genital Mutilation & Asylum in the European Union - A Statistical Overview*, February 2013, available at <http://www.unhcr.org/531880249.pdf> [Last Accessed 1 October 2015].

<sup>173</sup> Chapter III, section 10.2.2 of this research; G. Mackie, Ending Footbinding and Infibulation: A Convention Account, *American Sociological Review*, Volume 61, No. 6, 1996, p. 1003 and 1007.

<sup>174</sup> A. Rahman and N. Toubia, *Female Genital Mutilation, A Guide to Laws and Policies Worldwide*, Zed Books, 2000, p. 26.

<sup>175</sup> United Nations Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007, para. 9.

infliction of severe pain and suffering.”<sup>176</sup> The international community argues that FGM/C is deliberately inflicted (for discriminatory reason), since the parent(s) and cutter know that they are inflicting pain on the girl or women when the external female genitalia are removed or injured.

The third element requiring “the consent or acquiescence of a public official” might seem a very problematic element, since FGM/C is in (almost) all circumstances performed in private settings by non-State actors, beyond the view of public officials. However, the international community argues that FGM/C can nevertheless amount to torture if States fail to act with due diligence to prevent, investigate and punish these acts.<sup>177</sup> In 2000, the Human Rights Committee (HRC) stated in GC No. 28 that FGM/C is in breach of Article 7 of the ICCPR.<sup>178</sup> In 2002, Coomaraswamy, UN Special Rapporteur on VAW wrote that it is “imperative” that practices such as FGM/C “brutalize the female body.”<sup>179</sup> She explained that “those cultural practices that involve “severe pain and suffering” for the woman or the girl child, those that do not respect the physical integrity of the female body” as amounting to torture under customary international law.<sup>180</sup> In 2007, the CATCee indicated in its GC No. 2 that “Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State’s indifference or inaction provides a form of encouragement and/or *de facto* permission.”<sup>181</sup> The CATCee has applied this principle to States Parties’ failure to prevent and protect victims from gender-based violence, including FGM/C.<sup>182</sup> In 2008, Nowak, Special Rapporteur on torture considered FGM/C a “violation falling within his mandate.”<sup>183</sup> He reiterated the statements of the HRC<sup>184</sup> and the CATCee<sup>185</sup> and explained that FGM/C may constitute torture and that States have the responsibility to take all the necessary measures to eliminate the practice.<sup>186</sup> The Special Rapporteur on torture further explained in his report that even if a national law authorizes the practice, “any act of FGM would amount to torture and the existence of the law by itself would constitute consent or acquiescence by the State.”<sup>187</sup> He also highlighted that the medicalization of FGM/C does not make the practice more acceptable. The

<sup>176</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/HRC/7/3, 15 January 2008, para. 50.

<sup>177</sup> *Ibid.*, para. 32.

<sup>178</sup> United Nations Human Rights Committee, *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, CCPR/C/21/Rev.1/Add.10, 29 March 2000, para. 11.

<sup>179</sup> United Nations Commission on Human Rights, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences on Cultural practices in the Family that are Violent towards Women*, E/CN.4/2002/83, 31 January 2002, para. 6.

<sup>180</sup> *Ibid.*

<sup>181</sup> UN Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007, para. 18.

<sup>182</sup> *Ibid.*

<sup>183</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/HRC/7/3, 15 January 2008, para. 54.

<sup>184</sup> *Ibid.*

<sup>185</sup> *Ibid.*, para. 32.

<sup>186</sup> *Ibid.*, para. 54.

<sup>187</sup> *Ibid.*, para. 53.

Rapporteur also clarified that even in contexts where FGM/C has been recognized as a criminal offence, but where FGM/C is performed in public hospitals, FGM/C constitutes torture or ill-treatment.<sup>188</sup> In cases where FGM is performed in private clinics and physicians carrying out the procedure are not being prosecuted, the State de facto consents to the practice and is therefore accountable.<sup>189</sup> The Special Rapporteur on torture concluded that the concept of “acquiescence” entails “a duty for the State to prevent acts of torture in the private sphere and recalls that the concept of due diligence should be applied to examine whether States have lived up to their obligations.”<sup>190</sup> More information about the ‘due diligence test’ can be found in section 6.1.3 of this chapter. Surprisingly enough, Nowak was not the first Special Rapporteur that has clarified that FGM/C amounts to torture and the responsibility of States in relation to this practice. The first UN Special Rapporteur on torture, Kooijmans, already addressed this issue in 1986. While discussing the notion of the “qualified perpetrator”, he argued: “Nevertheless, the authorities’ passive attitude regarding customs broadly accepted in a number of countries (i.e. sexual mutilations and other tribal traditional practices) might be considered as “consent or acquiescence”, particularly when these practices are not prosecuted as criminal offences under domestic law, probably because the State itself is abandoning its function of protecting the citizens from any kind of torture.”<sup>191</sup>

All elements of this definition are met in the case of FGM/C and as a consequence, the practice can amount to “torture” under the CAT. The right not to be subjected to torture, inhuman or degrading treatment or punishment is protected in various international and regional human rights instruments (see table 4.2 below).

## 6.5 Rights of the child

Because FGM/C is commonly carried out on girls between 0 and 15 years,<sup>192</sup> the practice is fundamentally important in relation to the protection of the rights of the child. In general, FGM/C can violate children’s general rights as defined in the CRC and in the ACRWC, such as the right to be free from discrimination,<sup>193</sup> the right to life,<sup>194</sup> the right to be protected from all forms of mental and physical violence and maltreatment,<sup>195</sup> the right to highest attainable standard

<sup>188</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/HRC/7/3, 15 January 2008, para. 53.

<sup>189</sup> *Ibid.*

<sup>190</sup> *Ibid.*, para. 68.

<sup>191</sup> United Nations Economic and Social Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, E/CN.4/1986/15, 19 February 1986, para. 38.

<sup>192</sup> See also Chapter III, section 7.1 of this research.

<sup>193</sup> United Nations General Assembly, *Convention on the Rights of the Child (CRC)*, 20 November 1989, United Nations, Treaty Series, Volume 1577, Article 2(1); Organization of African Unity, *African Charter on the Rights and Welfare of the Child (ACRWC)*, 11 July 1990, Article 3.

<sup>194</sup> United Nations General Assembly, *Convention on the Rights of the Child (CRC)*, 20 November 1989, United Nations, Treaty Series, Volume 1577, Article 6(1); Organization of African Unity, *African Charter on the Rights and Welfare of the Child (ACRWC)*, 11 July 1990, Article 5(1).

<sup>195</sup> United Nations General Assembly, *Convention on the Rights of the Child (CRC)*, 20 November 1989, United Nations, Treaty Series, Volume 1577, Article 16(1) and 19(1); Organization of African



of physical, mental and spiritual health<sup>196</sup> and the freedom from torture or other cruel, inhuman or degrading treatment or punishment.<sup>197</sup>

More specifically, as the preamble of both the CRC and the ACRWC clarifies, a child needs special safeguards and care, by reason of the child's "physical and mental immaturity."<sup>198</sup> CRC GC No. 13 explains that children at risk of "harmful traditional practices" are likely to be exposed to violence and therefore labelled as "children in potentially vulnerable situations."<sup>199</sup> Human rights law grant children special protection. One of the general principles of the CRC can be found in Article 3(1) of the CRC that clarifies that in all actions concerning children "the best interests of the child shall be a primary consideration."<sup>200</sup> Similarly, the African Charter on the Rights and Welfare of the Child (ACRWC) addressed in Article 4(1) the same principle: "In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration."<sup>201</sup> In addition, Article 18(1) of the CRC and Article 20(1) of the ACRWC explain that parents (or other persons responsible for the child, such as legal guardians) shall have the primary responsibility for the upbringing and development of the child.

The previous chapter described in section 10 that FGM/C is endorsed by practicing communities and loving parents who perceive FGM/C to be in their daughter's best interests. In communities where FGM/C is a social norm, the practice is often a prerequisite for marriage. Parents will decide to cut their daughters, because a marriage is essential for a girl's economic security and social acceptance in the community. In addition, when families conform to the norm, they meet with social approval; it brings respect and admiration, and maintains social standing for a girl and her family in the community.<sup>202</sup> If a family decides not to cut their daughters, it will be more difficult (if not impossible) to get married. In addition, the failure to conform to the social norm in the society may lead to rejection, social exclusion, avoidance, ostracism, disapproval, rebuke or even violence.<sup>203</sup> Taking into account these social

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Unity, *African Charter on the Rights and Welfare of the Child (ACRWC)*, 11 July 1990, Article 10 and 16(1).

<sup>196</sup> United Nations General Assembly, *Convention on the Rights of the Child (CRC)*, 20 November 1989, United Nations, Treaty Series, Volume 1577, Article 24(1); Organization of African Unity, *African Charter on the Rights and Welfare of the Child (ACRWC)*, 11 July 1990, Article 14(1).

<sup>197</sup> United Nations General Assembly, *Convention on the Rights of the Child (CRC)*, 20 November 1989, United Nations, Treaty Series, Volume 1577, Article 37(a); Organization of African Unity, *African Charter on the Rights and Welfare of the Child (ACRWC)*, 11 July 1990, Article 16(1).

<sup>198</sup> United Nations General Assembly, *Convention on the Rights of the Child (CRC)*, 20 November 1989, United Nations, Treaty Series, Volume 1577, preamble; Organization of African Unity, *African Charter on the Rights and Welfare of the Child (ACRWC)*, 11 July 1990, preamble.

<sup>199</sup> United Nations Committee on the Rights of the Child, *General Comment No. 13: The Right of the Child to Freedom from all Forms of Violence*, CRC/C/GC/13, 18 April 2011, para. 72(g).

<sup>200</sup> *Ibid.*, para. 61.

<sup>201</sup> Organization of African Unity, *African Charter on the Rights and Welfare of the Child (ACRWC)*, 11 July 1990, Article 4(1).

<sup>202</sup> United Nations Children's Fund, *The Dynamics of Social Change: Towards the Abandonment of Female Genital Mutilation/Cutting in Five African Countries*, UNICEF Innocenti Research Centre, October 2010, p. 6.

<sup>203</sup> *Ibid.*, p. 6.

rewards and sanctions, FGM/C is perceived as the best choice for parents to ensure their daughters to have a 'good' future.

Although the concept of the child's best interests is rather complex, the CRCee has taken a very clear position. The CRCee emphasized in GC No. 13 that the interpretation of a child's best interest must be consistent with the whole Convention, including the obligation to protect children from all forms of violence. The CRCee explained: "an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention."<sup>204</sup> FGM/C can therefore never be justified, because the practice conflicts with the child's human dignity. Similarly, in GC No. 14 the CRCee recognized: "Although preservation of religious and cultural values and traditions as part of the identity of the child must be taken into consideration, practices that are inconsistent or incompatible with the rights established in the Convention are not in the child's best interests. Cultural identity cannot excuse or justify the perpetuation by decision-makers and authorities of traditions and cultural values that deny the child or children the rights guaranteed by the Convention."<sup>205</sup> Therefore, FGM/C is not in the best interest of the child.

In the majority of cases, FGM/C is performed without the consent of the girl. This can constitute a violation of Article 12(1): "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."<sup>206</sup> Similarly, the ACRWC also addresses the right to freedom of expression in Article 7.<sup>207</sup> A violation of these provisions is most obvious when girls are forcibly restrained during the procedure. However, also girls who consent to FGM/C or who asked for the procedure themselves are "highly susceptible to coercion by adults, who may subject a child to various types of persuasion."<sup>208</sup> The question is whether the consent of the girl is truly informed and meaningful. It is highly questionable whether a girl is capable to understand what happens to her genitalia (and consequences and potential implications) when she undergoes the procedure. In reality, the girl's consent might be flawed by tradition and culture as a result of a lack of comprehensive information, social pressure (fear for non-acceptance of their communities),<sup>209</sup> and allurements by means of gifts, clothes, and celebrations. These are all motivations for a girl (or woman) to

<sup>204</sup> United Nations Children's Fund, *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting*, UNICEF Innocenti Research Centre, 2005, p. 16

<sup>205</sup> United Nations Committee on the Rights of the Child, *General Comment No. 14 on the Right of the Child to Have his or her Best Interests Taken as a Primary Consideration* (Article 3, para. 1), CRC /C/GC/14, 29 May 2013, para. 57.

<sup>206</sup> United Nations General Assembly, *Convention on the Rights of the Child* (CRC), 20 November 1989, United Nations, Treaty Series, Volume 1577, Article 12(1).

<sup>207</sup> Organization of African Unity, *African Charter on the Rights and Welfare of the Child* (ACRWC), 11 July 1990, Article 7: "Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws."

<sup>208</sup> United Nations Children's Fund, *The Dynamics of Social Change: Towards the Abandonment of Female Genital Mutilation/Cutting in Five African Countries*, UNICEF Innocenti Research Centre, October 2010, p. 23.

<sup>209</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/HRC/7/3, 15 January 2008, para. 53.

consent to the procedure.<sup>210</sup> The rights of the child are protected in various international and regional human rights instruments (see table 4.2 below).

The table below provides an overview of the six human rights violated by FGM/C, and the international and regional human rights instruments in which they are enshrined. The table shows that the international community has incorporated a rich number of human rights in the discourse in relation to the practice of FGM/C. Although it could be argued that this list might be too rich, some people argue that more human rights are at stake, including the right to education and the rights of persons with disabilities. According to the International Federation of University Women, “the consequences of FGM can cause girls to miss school repeatedly and to drop out in order to manage their menstrual problems which are aggravated by FGM. Thus, FGM puts girls at a distinct disadvantage in all levels of education. In some communities, girls are removed from school to undergo the procedure and then marry immediately and their education comes to an abrupt and premature end.”<sup>211</sup> In addition, the UNFPA argues that FGM/C can result in disability and maternal morbidity: “The health consequences of FGM (especially from infibulation) can be considered a disability inflicted after birth.”<sup>212</sup> Therefore, the UNFPA argues that the rights established in the CRPD are applicable for girls and women who have undergone FGM/C as well, including the “obligation to ensure access to care to correct injuries from FGM” and an “obligation to provide psychosocial and other rehabilitation services for persons with disabilities.”<sup>213</sup> However, since the human rights framework is taken as it is, these two rights will not be taken into account when the duties of States will be analyzed.

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<sup>210</sup> United Nation Children’s Fund, *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting*, UNICEF Innocenti Research Centre, 2005, p. 16

<sup>211</sup> International Federation of University Women, *FGM Impedes Girls’ Full Educational Attainment*, 6 February 2014, available at [http://www.afgwnsw.org.au/wp-content/uploads/2014/01/2014\\_02\\_06\\_press\\_release\\_FGM\\_NFA.pdf](http://www.afgwnsw.org.au/wp-content/uploads/2014/01/2014_02_06_press_release_FGM_NFA.pdf) [Last Accessed 1 October 2015].

<sup>212</sup> United Nations Population Fund, *Implementation of the International and Regional Human Rights Framework for the Elimination of Female Genital Mutilation*, UNFPA New York, November 2014, p. 33.

<sup>213</sup> *Ibid.*

**Table 4.2 Human rights violated by FGM/C**

	Right to be free from gender discrimination	Right to life	Right to health	Right not to be subjected to torture	Rights of the child
UDHR	Art. 2	Art. 3	Art. 25	Art. 5	Art. 25
ICESCR	Art. 2(2) and 3		Art. 12		Art. 10
ICCPR	Art. 2(1), 3 and 26	Art. 6(1)		Art. 7	Art. 24
CEDAW	Art. 1 and 2		Art. 12		Art. 5(b)
CAT				All articles.	
CRC	Art. 2(1)	Art. 6(1)	Art. 24(1)	Art. 37(a)	All articles.
ACHPR	Art. 18(3) and 28	Art. 4	Art. 16	Art. 5	Art. 18(3)
Maputo Protocol	Art. 2	Art. 4	Art. 14		
ACHWC	Art. 3	Art. 5(1)	Art. 14(1)	Art. 16(1)	
AYC	Art. 2 and 23		Art. 16	Art. 18(2)	All articles

## 7 DUTIES OF STATES IN RELATION TO THE ELIMINATION OF FGM/C

Now FGM/C is classified as a human rights violation, the next step is to specify the legally binding obligations (and non-binding recommendations) in relation to the elimination of FGM/C, with which States need to comply with once they have ratified the human rights treaties. Shelton and Gould explain that “human rights law has a dual nature, because it is not sufficient to proclaim rights; it is also necessary to identify duty-holders and their obligations.”<sup>214</sup> In case of international human rights instruments, this means specifying the obligations of States Parties to human rights treaties.

### 7.1 State responsibility

#### 7.1.1 Traditional State-centric approach

The doctrine of State responsibility, a fundamental principle in international law, governs when and how States are held accountable for a breach of an international obligation. The Draft Articles on Responsibility of States for Internationally Wrongful Acts<sup>215</sup> (DARSIWA) formulate the basic rules of international law concerning the responsibility of States for their

<sup>214</sup> D. Shelton and A. Gould, *Positive and Negative Obligations*, in: D. Shelton, *The Oxford Handbook of International Human Rights Law*, Oxford University Press, 2013, p. 562.

<sup>215</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, as contained in United Nations General Assembly, *Report of the International Law Commission on the Work of its 52nd Session*, A/55/10, 2000.

“internationally wrongful acts.” The traditional State-centric approach to international law considered States as the primary subjects of international law, since States were considered the *dramatis personae* (the characters of the play) on the international scene.<sup>216</sup> Article 4(1) of the DARSIVA includes acts and omissions that can be attributed to the State and State organs.<sup>217</sup> The commentary of the DARSIVA clarifies that as a general principle, the conduct of private actors is not attributable to the State.<sup>218</sup> The State was only responsible for its own acts (or public acts performed by State organs or agents).<sup>219</sup> For that reason, the practice of FGM/C was initially placed beyond the scope of international law and felt outside the scope of State responsibility. After all, the practitioners who perform FGM/C are private individuals, rather than public (State) officials.

### 7.1.2 Horizontal effect of human rights

In the field of human rights law, the centrality of the State has considerably diminished, since the principal beneficiaries of international human rights are private individuals. When a State accepts a human rights treaty through ratification, accession or succession, it assumes an obligation under international law to ‘respect’, ‘protect’ and ‘fulfil’ the rights set out in the treaty.<sup>220</sup> The obligation to ‘respect’ means that States must refrain from interfering with or curtailing the enjoyment of human rights (negative obligation). The obligation to ‘protect’ requires States to protect individuals and groups against human rights abuses. The obligation to ‘fulfil’ means that States must take positive action to facilitate the enjoyment of human rights.<sup>221</sup> Both the obligation to ‘protect’ and ‘fulfil’ are positive obligations.<sup>222</sup>

<sup>216</sup> A. Cassese, *International Law*, Oxford University Press, 2005, p. 71.

<sup>217</sup> Article 4(1) of the DARSIVA reads as follows: “The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.” See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries*, 2001, p. 40, available at [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) [Last Accessed 1 October 2015].

<sup>218</sup> *Ibid.*, p. 38.

<sup>219</sup> D. Shelton, *Protecting Human Rights in a Globalized World*, *Boston College International and Comparative Law Review*, Volume 25, No. 2, 2002, p. 273.

<sup>220</sup> United Nations Human Rights Committee, *General Comment No. 12: The Right to Adequate Food* (Art. 11 of the Covenant), E/C.12/1999/5, 12 May 1999, para. 15; United Nations Human Rights Committee, *General Comment No. 13: The Right to Education* (Art. 13 of the Covenant), E/C.12/1999/10, 8 December 1999, para. 46. This typology was introduced by H. Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*, Princeton University Press, 1996, p. 52, and then developed by A. Eide: United Nations, *The Right to Adequate Food as a Human Right*, Final Report submitted by A. Eide, Special Rapporteur, E/CN.4/Sub.2/1987/23, 1987.

<sup>221</sup> Office of the High Commissioner for Human Rights, *International Human Rights Law*, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> [Last Accessed 1 October 2015].

<sup>222</sup> United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, CEDAW/C/GC/28, 16 December 2010, para. 9.

Although international human rights law was initially seen as guarantees to protect individuals (and groups) from abuse action by States, State responsibility for violations committed in the private sphere is established as well. The protection of women from VAW in general and FGM/C in particular has been defined as a positive obligation on States. As already touched upon in section 5.5 of this chapter (while addressing the question whether FGM/C violates the right not to be subjected to torture, inhuman or degrading treatment or punishment), it was established that States must act with due diligence to protect women who are at risk of being violently abused.<sup>223</sup>

### 7.1.3 Due diligence

But what is the due diligence standard? This principle establishes the attribution of private actor's acts or omission of acts to the State under international law. In 1992, the CEDAWCee established in GR No. 19 that the State may also be responsible for "private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation."<sup>224</sup> The CEDAWCee also made specific recommendations for States to provide effective protection of women against VAW, including legal, preventive and protective measures.<sup>225</sup> In 1993, the DEVAW stated that States should condemn VAW and should "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons."<sup>226</sup> Where governments fail to act with due diligence to ensure protected rights, they may themselves be held responsible for violations of those rights by private parties. The same provision can be found in the Beijing Declaration and Platform for Action.<sup>227</sup>

A landmark decision in relation to State responsibility for acts by private individuals is the judgment of the Inter-American Court of Human Rights in the case of *Velásquez Rodríguez*.<sup>228</sup> The Government of Honduras was held responsible for the disappearance of Manfredo Velásquez Rodríguez, even without proof of direct government action. The Inter-American Court established that "An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but

<sup>223</sup> European Court of Human Rights, *Opuz v. Turkey*, (Application No. 33401/02), Judgment of 9 June 2009; Inter-American Court of Human Rights, *Velásquez Rodríguez*, Ser. C, No. 4, Judgment of 29 July 1988.

<sup>224</sup> United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence Against Women*, 1992, para. 9.

<sup>225</sup> *Ibid.*, para. 24 (t)(i)(ii)(iii).

<sup>226</sup> United Nations General Assembly, *Declaration on the Elimination of Violence Against Women*, A/RES/48/104, 20 December 1993, Article 4(c).

<sup>227</sup> United Nations, *Beijing Declaration and Platform of Action*, adopted at the Fourth World Conference on Women, 27 October 1995, para. 124(b).

<sup>228</sup> Inter-American Court of Human Rights, *Velásquez Rodríguez*, Ser. C, No. 4, Judgment of 29 July 1988, para 172.

because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”<sup>229</sup>

Other international<sup>230</sup> and regional<sup>231</sup> human rights Treaty Monitoring Bodies have also adopted the due diligence principle. According to the recent Joint GR No. 31 of the CEDAWCee / GC No. 18 of the CRCee on harmful practices, States parties to both the CEDAW and CRC have a due diligence obligation “to prevent acts that impair the recognition, enjoyment or exercise of rights by women and children and ensure that private actors do not engage in discrimination against women and girls, including gender-based violence in relation to CEDAW, or any form of violence against children, in relation to CRC.” According to both Committees, due diligence should be understood as “an obligation of States parties to the Conventions to prevent violence or violations of human rights, protect victims and witnesses from violations, investigate and punish those responsible, including private actors, and provide access to redress for human rights violations.”<sup>232</sup>

## 7.2 Obligations for States in relation to the elimination of FGM/C

Now that it is established that States have a due diligence obligation to prevent, protect, investigate, prosecute and punish acts of VAW, including FGM/C, the next step is to explain what the obligations for States are in relation to the elimination of FGM/C.

### 7.2.1 FGM/C in human rights treaties

While there are American and European treaties that specifically address VAW<sup>233</sup> (and contain specific provisions on FGM/C)<sup>234</sup> there is no international treaty specifically dealing with VAW or FGM/C in particular. The practice of FGM/C is not specifically mentioned in any of the nine international “core” human rights treaties at the international level (as listed in Table 1.1). The

<sup>229</sup> Inter-American Court of Human Rights, *Velasquez Rodríguez*, Ser. C, No. 4, Judgment of 29 July 1988, para 172.

<sup>230</sup> United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, CEDAW/C/GC/28, 16 December 2010, para. 13 and 19; United Nations Committee on the Rights of the Child, *General Comment No. 13: The Right of the Child to Freedom from all Forms of Violence*, CRC/C/GC/13, 18 April 2011, para. 5.

<sup>231</sup> African Commission on Human and Peoples’ Rights, *Communication No 155/96*, 2001.

<sup>232</sup> United Nations Committee on the Elimination of Discrimination Against Women and the United Nations Committee on the Rights of the Child, *Joint general Recommendation No. 31 of the Committee on the Elimination of Discrimination Against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices*, CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014, para. 10.

<sup>233</sup> For instance the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem Do Para) and the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).

<sup>234</sup> Council of Europe, *Convention on Preventing and Combating Violence Against Women and Domestic Violence*, 11 May 2011, Article 38: “Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised: a) excising, infibulating or performing any other mutilation to the whole or any part of a woman’s labia majora, labia minora or clitoris; b) coercing or procuring a woman to undergo any of the acts listed in point a; c) inciting, coercing or procuring a girl to undergo any of the acts listed in point a.”

CEDAW for example does only specifically mention ‘trafficking in women’ and ‘exploitation of prostitution’, but not the practice of FGM/C.<sup>235</sup>

The extent to which human rights conventions explicitly deal with FGM/C varies, because the issue of harmful practices and FGM/C specifically was less known at the time of the drafting of most human right instruments.<sup>236</sup> However, some conventions make explicit reference to harmful practices. The CEDAW includes for example references to “customs and practices which constitute discrimination against women,”<sup>237</sup> and “customary and all other practices.”<sup>238</sup> The CRC mentions “traditional practices prejudicial to the health of children.”<sup>239</sup> The ACRWC addresses “harmful social and cultural practices”<sup>240</sup> and the AYC include reference to “harmful social and cultural practices.”<sup>241</sup>

The Maputo Protocol is the only human rights instrument (applicable in Africa) in which “female genital mutilation” is expressly mentioned. Article 5 obliges States parties to take steps to ensure that the practice of FGM/C is eliminated.

### 7.2.2 Legally binding obligations in relation to FGM/C

State’s duty to take action against FGM/C has its foundations in the provisions of human rights treaties. In the first place, States have a duty to modify customs that discriminate against women. Article 2(f) of the CEDAW obligate States Parties to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices, which constitute discrimination against women.” In addition, States have a duty to take measures to address discriminatory customs. Article 5(a) of the CEDAW requires States Parties to: “take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”<sup>242</sup> Similarly, the Maputo Protocol established in Article 2(2) that States parties shall commit themselves “to

<sup>235</sup> United Nations General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, 18 December 1979, United Nations, Treaty Series, Volume 1249, Article 6: “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”

<sup>236</sup> United Nations Committee on the Elimination of Discrimination Against Women and the United Nations Committee on the Rights of the Child, *Joint general Recommendation No. 31 of the Committee on the Elimination of Discrimination Against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices*, CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014, para. 10.

<sup>237</sup> United Nations General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, 18 December 1979, United Nations, Treaty Series, Volume 1249, Article 2.

<sup>238</sup> *Ibid*, Article 5.

<sup>239</sup> United Nations General Assembly, *Convention on the Rights of the Child (CRC)*, 20 November 1989, United Nations, Treaty Series, Volume 1577, Article 24(3).

<sup>240</sup> Organization of African Unity, *African Charter on the Rights and Welfare of the Child (ACRWC)*, 11 July 1990, Article 21(1)(a)(b).

<sup>241</sup> African Union, *African Youth Charter*, 2 July 2006, Article 25.

<sup>242</sup> United Nations General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, 18 December 1979, United Nations, Treaty Series, Volume 1249, Article 5(a).



modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.”<sup>243</sup> The GA reiterated this duty in several Resolutions.<sup>244</sup>

In the second place, states have a duty to abolish practices that are harmful to children. Article 24(3) of the CRC obliges State Parties to “take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.”<sup>245</sup> Although Article 24(3) does not mention the practice specifically, the *travaux préparatoires* make it clear that the Working Group had “female circumcision” in mind when they were debating “traditional practices.”<sup>246</sup> A similar provision can be found in the ACRWC in Article 21(1) that State Parties oblige to “take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: (a) those customs and practices prejudicial to the health or life of the child; and (b) those customs and practices discriminatory to the child on the grounds of sex or other status.”<sup>247</sup>

In the third place, States have a duty to ensure health care services and access to health information. Art. 12(1) of the CEDAW obliges States to “take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services.” CEDAW GR No. 24 explains that this duty implies an obligation to respect, protect, and fulfil women’s right to health care. In addition, Article 10(h) of the CEDAW obliges States to ensure “access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.” Other international and regional conventions oblige governments as well to ensure necessary medical assistance and health care.<sup>248</sup> The ACHPR obliges States for example in Article 16 to “take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.” The ICESCR obliges States parties to take steps necessary for “the provision for the reduction

<sup>243</sup> African Union, *Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa*, 11 July 2003, Article 2(2).

<sup>244</sup> United Nations General Assembly, *Declaration on the Elimination of Violence Against Women*, A/RES/48/104, 20 December 1993, Article 4(j); United Nations General Assembly, *Resolution 63/155 on Intensification of Efforts to Eliminate all Forms of Violence Against Women*, A/RES/63/155, 30 January 2009, para. 16(i).

<sup>245</sup> United Nations General Assembly, *Convention on the Rights of the Child (CRC)*, 20 November 1989, United Nations, Treaty Series, Volume 1577, Article 34(3).

<sup>246</sup> S. Detrick et al., *The United Nations Convention on the Rights of the Child: A Guide to the “Travaux Préparatoires”*, Martinus Nijhoff Publishers, 1992, p. 352.

<sup>247</sup> Organization of African Unity, *African Charter on the Rights and Welfare of the Child (ACRWC)*, 11 July 1990, Article. 21(1).

<sup>248</sup> *Ibid*, Article 14(2); United Nations General Assembly, *Convention on the Rights of the Child (CRC)*, 20 November 1989, United Nations, Treaty Series, Volume 1577, Article 24(2).

of the still-birth-rate and of infant mortality and for the healthy development of the child.”<sup>249</sup>

However, the most elaborate human rights instrument is the Maputo Protocol. This African treaty is the only legally binding instrument applicable in Africa that explicitly addresses the practice of FGM/C. It is a comprehensive tool upon which African States can devise both legal and non-legal measures to eliminate FGM/C. Article 5 of the Protocol includes duties for States to take measures in order to eliminate FGM/C and obliges States Parties to:

“Prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:

- a. Creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;
- b. Prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them;
- c. Provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;
- d. Protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.”

### 7.3 Action to be taken by States in relation to the elimination of FGM/C

Apart from these legally binding obligations, soft law documents provide recommendations for States in relation to the practice of FGM/C. The section below provides an overview of the actions to be taken by States in relation to the elimination of FGM/C that follow from the international (UN) and regional (AU) human rights framework. This is a categorization of all actions (including obligations and recommendations) that follow from both legally binding instruments (as described in section 7.2.2) and non-binding documents.

#### 7.3.1 Ratification of human rights treaties

First of all, the GA stressed the need for universal ratification of human rights instruments<sup>250</sup> and called upon States to sign and ratify, if they have not yet done so, all human rights treaties, in particular the CEDAW, CRC, and its optional protocols.<sup>251</sup> Apart from becoming a State party, States are urged to

<sup>249</sup> United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 16 December 1966, United Nations, Treaty Series, Volume 993, Article 12.

<sup>250</sup> See for example United Nations General Assembly, *Resolution 58/156 on The Girl Child*, A/RES/58/156, 26 February 2004, para. 1.

<sup>251</sup> See for example United Nations General Assembly, *Resolution S-27/2 on A World Fit For Children*, A/RES/S-27/2, 11 October 2002, para. 29; United Nations General Assembly, *Declaration on the Elimination of Violence against Women*, A/RES/48/104, 20 December 1993, Article 4(c); United Nations General Assembly, *Resolution 52/99 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/52/637, 12 December 1997, para. 3(b); United Nations General Assembly, *Resolution 53/117 on Traditional or Customary Practices affecting the Health of Women and Girls*,

respect and fully implement their treaty obligations under the relevant human rights treaties to which they are parties and to withdraw reservations incompatible with the object and purpose of the relevant treaty.<sup>252</sup> The GA emphasized the “incompatibility” between the continuation of “harmful traditional or customary practices” and the obligations States have voluntarily undertaken through the ratification of international human rights instruments.<sup>253</sup> In addition, States are called upon by the GA to implement (further) their international commitments in this field, *inter alia*, under the Vienna Declaration and Programme of Action, the Programme of Action of the ICPD and the Beijing Declaration and the Platform for Action.<sup>254</sup> States are also called upon to take measures to address the obstacles that continue to affect the achievement of the goals set forth in the Beijing Platform for Action.<sup>255</sup>

### 7.3.2 Cooperation with Treaty Monitoring Bodies

In the second place, once States have ratified a human rights treaty, they are under the obligation to submit periodic reports to the relevant treaty body on how the rights are being implemented. States must report initially one year after the entry into force and then whenever the Committee requests (usually at least every four years). There are ten UN<sup>256</sup> treaty-monitoring bodies and two

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A/RES/53/117, 1 February 1999, para. 3(a); United Nations General Assembly, *Resolution 54/133 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/54/133, 7 February 2000, para. 3(a); United Nations General Assembly, *Resolution 56/128 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/56/128, 30 January 2002, para. 3(a); United Nations General Assembly, *Resolution 58/156 on The Girl Child*, A/RES/58/156, 26 February 2004, para. 1, 2 and 7; United Nations General Assembly, *Resolution 60/141 on The Girl Child*, A/RES/60/141, 11 January 2006, para. 1-2; United Nations General Assembly, *Resolution 61/143 on the Intensification of Efforts to Eliminate all Forms of Violence Against Women*, A/RES/61/143, 30 January 2007, para. 8(b); United Nations General Assembly, *Resolution 62/140 on The Girl Child*, A/RES/62/140, 19 February 2008, para. 1-2; United Nations General Assembly, *Resolution 66/140 on The Girl Child*, A/RES/66/140, 27 March 2012, para. 1 and 10.

<sup>252</sup> United Nations General Assembly, *Resolution S-27/2 on A World Fit For Children*, A/RES/S-27/2, 11 October 2002, para. 29; United Nations General Assembly, *Resolution 61/143 on the Intensification of Efforts to Eliminate all Forms of Violence Against Women*, A/RES/61/143, 30 January 2007, para. 8(b).

<sup>253</sup> United Nations General Assembly, *Resolution 52/99 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/52/637, 12 December 1997, para. 3(b).

<sup>254</sup> See for example United Nations General Assembly, *Resolution 52/99 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/52/637, 12 December 1997, para. 3(a); United Nations General Assembly, *Resolution 53/117 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/53/117, 1 February 1999, para. 3(b); United Nations General Assembly, *Resolution 54/133 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/54/133, 7 February 2000, para. 3(b); United Nations General Assembly, *Resolution 56/128 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/56/128, 30 January 2002, para. 3(b); United Nations General Assembly, *Resolution 58/156 on The Girl Child*, A/RES/58/156, 26 February 2004, para. 7; United Nations General Assembly, *Resolution 60/141 on The Girl Child*, A/RES/60/141, 11 January 2006, para. 7 and 11;

<sup>255</sup> United Nations General Assembly, *Resolution 62/140 on The Girl Child*, A/RES/62/140, 19 February 2008, para. 7; United Nations General Assembly, *Resolution 66/140 on The Girl Child*, A/RES/66/140, 27 March 2012, para. 9.

<sup>256</sup> The Human Rights Committee is monitoring the ICCPR, the Committee on Economic, Social and Cultural Rights is monitoring the ICESCR, the Committee on the Elimination of Racial Discrimination is monitoring the ICERD, the Committee on the Elimination of Discrimination against Women is monitoring CEDAW, the Committee against Torture is monitoring CAT, the Subcommittee on Prevention of Torture (SPT) is monitoring the OP-CAT, the Committee on the

AU<sup>257</sup> treaty-monitoring bodies. For example, according to Article 18 of the CEDAW, States parties are under the obligation to submit to the Secretary-General, for consideration by the CEDAWCee, a report on “the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect.”

More specifically in relation to VAW, GR No. 12 of the CEDAWCee recommended States parties to include in their periodic reports information about the legislation in force to protect women against the incidence of all kinds of violence in everyday life and other measures adopted to eliminate VAW.<sup>258</sup> In addition, States are recommended to include statistical data in their reports on the incidence of all kinds of VAW.<sup>259</sup> This recommendation was reiterated in CEDAW GR No. 19.<sup>260</sup> The CEDAWCee concluded in GR No. 19 that not all the reports of States parties “adequately reflected the close connection between discrimination against women, gender-based violence, and violations of human rights and fundamental freedoms.”<sup>261</sup> The Committee further explained that States parties should identify the nature and extent of attitudes, customs and practices that perpetuate VAW in their reports.

More specifically in relation to FGM/C, GR No. 14 of the CEDAWCee recommended States parties to include in their periodic reports information about measures taken to eliminate FGM/C.<sup>262</sup> The GA called upon States “to include specific information on measures taken to eliminate traditional or customary practices harmful to the health of women and girls” in their reports to the CEDAWCee and CRCee.<sup>263</sup>

### 7.3.3 Constitutional guarantees on non-discrimination and gender-equality

Article 2(a) of the CEDAW establishes the obligation of States parties to condemn discrimination against women in all its forms and “to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle.”<sup>264</sup> In addition, CEDAW GR No. 28 explains that States must ensure

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Rights of the Child is monitoring the CRC, the Committee on Migrant Workers is monitoring the ICRMW, the Committee on the Rights of Persons with Disabilities is monitoring the CRPD, the Committee on Enforced Disappearances is monitoring the ICED.

<sup>257</sup> The African Commission on Human and Peoples’ Rights is monitoring the ACHPR and the African Committee of Experts on the Rights and Welfare of the Child is monitoring the ACRWC.

<sup>258</sup> United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 12: Violence Against Women*, 1989, para. 1-2.

<sup>259</sup> *Ibid*, para. 4.

<sup>260</sup> United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence Against Women*, 1992, para. 2.

<sup>261</sup> *Ibid*, para. 4.

<sup>262</sup> United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 14: Female Circumcision*, A/45/38, 1990, para. (d).

<sup>263</sup> United Nations General Assembly, *Resolution 52/99 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/52/637, 12 December 1997, para. 3(c).

<sup>264</sup> United Nations General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, 18 December 1979, United Nations, Treaty Series, Volume 1249, Article 2(a).

that, “through constitutional amendments or by other appropriate legislative means, the principle of equality between women and men and of non-discrimination is enshrined in domestic law with an overriding and enforceable status.”<sup>265</sup> The GA also emphasized that States should review and, where appropriate, revise, amend or abolish all laws, regulations, practices and customs that discriminate against women or have a discriminatory impact on women.<sup>266</sup>

### 7.3.4 Criminalizing FGM/C

In the first place, the Maputo Protocol obliges States to condemn and prohibit all forms of harmful practices, including the medicalisation and paramedicalisation<sup>267</sup> of FGM/C.<sup>268</sup> The UN GA and WHO also addressed the medicalization of the practice in their respective Resolutions, in which they expressed their concern about emerging evidence of an increase in the incidence of FGM/C being carried out by medical personnel in all regions.<sup>269</sup> Therefore, the GA urged States to condemn all forms of FGM/C “whether committed within or outside a medical institution.”<sup>270</sup>

The Maputo Protocol obliges States Parties to prohibit FGM/C “through legislative measures backed by sanctions.”<sup>271</sup> This obligation is mentioned in several (much earlier adopted) human rights documents as well. The ICPD Programme of Action urged governments for example “to prohibit female genital mutilation wherever it exist.”<sup>272</sup> The Beijing Declaration and Platform for Action asked governments “to enact and enforce legislation against the perpetrators of practices and acts of violence against women, such as female genital mutilation.”<sup>273</sup> The prohibition of FGM/C by the enactment and effective enforcement of legislation to protect girls and women, including the

<sup>265</sup> United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, CEDAW/C/GC/28, 16 December 2010, para. 31.

<sup>266</sup> United Nations General Assembly, *Resolution 63/155 on Intensification of Efforts to Eliminate all Forms of Violence Against Women*, A/RES/63/155, 30 January 2009, para. 16(b);

<sup>267</sup> For more information about the medicalization of FGM/C, see Chapter III, section 7.2.2 of this research.

<sup>268</sup> African Union, *Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa*, 11 July 2003, Article 5.

<sup>269</sup> United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, preamble; World Health Organization, *World Health Assembly Resolution on Female Genital Mutilation*, WHA61.16, 24 May 2008, preamble.

<sup>270</sup> United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, para. 4; Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/6, 3 December 2009, para. 39.

<sup>271</sup> African Union, *Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa*, 11 July 2003, Article 5.

<sup>272</sup> United Nations Population Fund, *Report of the International Conference on Population and Development*, Cairo, A/CONF.171/13/Rev.1, 5-13 September 1994, para. 4.22.

<sup>273</sup> United Nations, *Beijing Declaration and Platform of Action*, adopted at the Fourth World Conference on Women, 27 October 1995, para. 124(i) and 283(d); United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights*, E/C.12/2005/4, 11 August 2005, para. 29.

prosecution of perpetrators of FGM/C, has been mentioned in many human rights documents.<sup>274</sup> More specifically in relation to sanctions, the Secretary-General wrote in his report that States should put in place effective sanctions “to discourage health professionals from performing female genital mutilation, and to ensure that all relevant professionals, including those in schools and health and social services, are duty-bound to report cases of female genital mutilation and cases in which they believe girls or women are at risk.”<sup>275</sup> In addition, the CSW urged States to review, and, where appropriate, revise, amend or abolish all laws, regulations, policies, practices and customs that discriminate against women or have a discriminatory impact on women.<sup>276</sup>

In order to ensure the effective implementation of national laws prohibiting FGM/C, the UN GA urged States to establish “a concrete national mechanism for the implementation and monitoring of legislation, law enforcement and national policies”<sup>277</sup> and to put in place “adequate accountability mechanisms at the national and local levels to monitor adherence to and implementation of these legislative frameworks.”<sup>278</sup> In addition, States should allocate “sufficient

<sup>274</sup> United Nations General Assembly, *Resolution 52/99 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/52/637, 12 December 1997, para. 3(e); United Nations General Assembly, *Resolution 53/117 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/53/117, 1 February 1999, para. 3(c); United Nations General Assembly, *Resolution 54/133 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/54/133, 7 February 2000, para. 3(d); United Nations General Assembly, *Resolution 56/128 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/56/128, 30 January 2002, para. 3(d); United Nations General Assembly, *Resolution 58/156 on The Girl Child*, A/RES/58/156, 26 February 2004, para. 9; United Nations General Assembly, *Resolution 60/141 on The Girl Child*, A/RES/60/141, 11 January 2006, para. 9; United Nations General Assembly, *Resolution 62/140 on The Girl Child*, A/RES/62/140, 19 February 2008, para. 13; United Nations General Assembly, *Resolution 63/155 on Intensification of Efforts to Eliminate all Forms of Violence Against Women*, A/RES/63/155, 30 January 2009, para. 16(b); United Nations General Assembly, *Resolution 66/140 on The Girl Child*, A/RES/66/140, 27 March 2012, para. 24; United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, para. 4; United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights*, E/C.12/2005/4, 11 August 2005, para. 29; United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, A/54/38/Rev.1, 1999, para. 15(d); World Health Organization, *World Health Assembly Resolution on Female Genital Mutilation*, WHA61.16, 24 May 2008, para. 1(2)

<sup>275</sup> Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/6, 3 December 2009, para. 39.

<sup>276</sup> Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/L.8, 5 December 2011, para. 13.

<sup>277</sup> United Nations General Assembly, *Resolution 53/117 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/53/117, 1 February 1999, para. 3(c); United Nations General Assembly, *Resolution 54/133 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/54/133, 7 February 2000, para. 3(f); United Nations General Assembly, *Resolution 56/128 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/56/128, 30 January 2002, para. 3(e); United Nations General Assembly, *Resolution 63/155 on Intensification of Efforts to Eliminate all Forms of Violence Against Women*, A/RES/63/155, 30 January 2009, para. 16(f).

<sup>278</sup> United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, para. 12; Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/L.8, 5 December 2011, para. 15.

resources”<sup>279</sup> to the implementation of legislative frameworks aimed at eliminating FGM/C.<sup>280</sup> The DEVAW also recommended governments to include in government budgets “adequate resources” related to the elimination of VAW.<sup>281</sup> To sum up, legislation aimed at eliminating FGM/C must include “appropriate budgeting, implementing, monitoring and effective enforcement measures.”<sup>282</sup>

### 7.3.5 Policies and National Action Plans

In order to ensure the effective implementation of national legislative frameworks, States are urged to develop effective and appropriate measures, including NAPs, strategies, policies, protocols, rules and regulations aimed at preventing and abolishing FGM/C.<sup>283</sup> These NAPs and strategies should to be “comprehensive” and “multidisciplinary” in scope and “incorporate clear targets and indicators for the effective monitoring, impact assessment and coordination of programmes among all stakeholders.”<sup>284</sup> The CEDAW Committee recommends to States parties in GR No. 14 to include in their national health policies appropriate strategies aimed at eliminating FGM/C in public health care. More specifically, “such strategies could include the special responsibility of health personnel, including traditional birth attendants, to explain the

<sup>279</sup> United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, para. 14.

<sup>280</sup> Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/6, 3 December 2009, para. 39.

<sup>281</sup> United Nations General Assembly, *Declaration on the Elimination of Violence Against Women*, A/RES/48/104, 20 December 1993, Article 4(h).

<sup>282</sup> United Nations Committee on the Elimination of Discrimination Against Women and the United Nations Committee on the Rights of the Child, *Joint general Recommendation No. 31 of the Committee on the Elimination of Discrimination Against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices*, CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014, para. 11; United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, CEDAW/C/GC/28, 16 December 2010, para. 38(a); United Nations Committee on the Rights of the Child, *General Comment No. 13: The Right of the Child to Freedom from all Forms of Violence*, CRC/C/GC/13, 18 April 2011, para. 40.

<sup>283</sup> United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, para. 12; United Nations Human Rights Committee, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, E/C.12/2000/4, 11 August 2000, para. 22; Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/L.8, 5 December 2011, para. 15; United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 14: Female Circumcision*, A/45/38, 1990; United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, CEDAW/C/GC/28, 16 December 2010, para. 38(a).

<sup>284</sup> United Nations General Assembly, *Resolution 60/141 on The Girl Child*, A/RES/60/141, 11 January 2006, para. 10; United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, para. 7; Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/L.8, 5 December 2011, para. 8; Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2012/8, 5 December 2011, para. 49; Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/6, 3 December 2009, para. 39.

harmful effects of female circumcision.”<sup>285</sup> The GA also urged States, the international community, the relevant United Nations entities, civil society and international financial institutions to continue to actively support other “targeted innovative programmes” that address ending FGM/C.<sup>286</sup> States are also urged to allocate “adequate human and financial resources”<sup>287</sup> to the implementation of FGM/C policies and NAPs.<sup>288</sup> The UN SG writes in his report that “Strong political commitment is required at the national level, demonstrated by comprehensive national laws and policies and the allocation of sufficient resources, including budgets, for their implementation.”<sup>289</sup>

### 7.3.6 Data-collection and research

According to the Secretary-General, the availability of better data is critical for informed legal and policy development to address FGM/C.<sup>290</sup> Therefore, States are recommended to collect and disseminate basic data about the prevalence, trends, attitudes and behaviour regarding FGM/C, as well as on reported cases and enforcement of legislation. The ultimate aim is to achieve a “strong knowledge base for effective action.”<sup>291</sup> This recommendation can be found in many human rights documents.<sup>292</sup> Universities, medial or nursing associations,

<sup>285</sup> United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 14: Female Circumcision*, A/45/38, 1990.

<sup>286</sup> United Nations General Assembly, *Resolution 62/140 on The Girl Child*, A/RES/62/140, 19 February 2008, para. 29.

<sup>287</sup> United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, CEDAW/C/GC/28, 16 December 2010, para. 38(a).

<sup>288</sup> United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, para. 14; Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/L.8, 5 December 2011, para. 17; Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/6, 3 December 2009, para. 40; United Nations General Assembly, *Declaration on the Elimination of Violence against Women*, A/RES/48/104, 20 December 1993, Article 4(h).

<sup>289</sup> Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2012/8, 5 December 2011, para. 47.

<sup>290</sup> Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/6, 3 December 2009, para. 16; United Nations Committee on the Elimination of Discrimination Against Women and the United Nations Committee on the Rights of the Child, *Joint general Recommendation No. 31 of the Committee on the Elimination of Discrimination Against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices*, CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014, para. 36.

<sup>291</sup> Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/6, 3 December 2009, para. 16.

<sup>292</sup> United Nations General Assembly, *Resolution 54/133 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/54/133, 7 February 2000, para. 3(c); United Nations General Assembly, *Resolution 56/128 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/56/128, 30 January 2002, para. 3(c); United Nations Commission on Human Rights, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences on Cultural practices in the Family that are Violent towards Women*, E/CN.4/2002/83, 31 January 2002, para. 130; United Nations Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/HRC/7/3, 15 January 2008, para 76; Report of the Secretary-General on Traditional or customary practices affecting the health of women and girls (A/53/354, of 10 September 1998), para. 15 and 34; United Nations General Assembly, *Traditional or*



national women's organizations or other bodies, can do the data collection and dissemination.<sup>293</sup> When data collection and analysis on FGM/C is already taking place, it should, according to the UN Secretary General "be strengthened and made more systematic, especially with respect to data on younger girls."<sup>294</sup> In addition, qualitative research should also be intensified "to improve understanding of sociocultural factors that could facilitate abandonment and inform effective strategies to eliminate female genital mutilation."<sup>295</sup> Unfortunately, the GA stated in their most recent Resolution that FGM/C is still "underdocumented."<sup>296</sup> Both the CRCee and CEDAWCee recommended to "prioritizing the regular collection, analysis, dissemination and use of quantitative and qualitative data on harmful practices disaggregated on the basis of sex, age, geographical location, socio-economic status, education levels and other key factors, and ensure that these activities are adequately resourced."<sup>297</sup> These data collection systems should be established within health care and social services, education, judicial and law enforcement sectors on protection related issues.<sup>298</sup> States are also recommended to collect data through the use of national demographic and indicator surveys and censuses, which may be supplemented, by data from nationally representative household surveys. Qualitative research should be gathered through focus group discussions, in-depth key informant interviews with a wide variety of stakeholders, structured observations, social mapping and other appropriate methodologies.<sup>299</sup> Specifically in relation to FGM/C, States are called upon to develop unified methods and standards for the collection of age-disaggregated data and to develop additional indicators to effectively measure progress in eliminating FGM/C.<sup>300</sup>

### 7.3.7 Awareness-raising and school curricula

The punitive measures described above need to be complemented with awareness-raising and educational activities. Article 5 of the Maputo Protocol includes an obligation for States to create public awareness in all sectors of

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*Customary Practices Affecting the Health of Women and Girls: Report of the Secretary-General*, A/58/169, 18 July 2003, para. 49.

<sup>293</sup> United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 14: Female Circumcision*, A/45/38, 1990.

<sup>294</sup> Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2012/8, 5 December 2011, para. 53.

<sup>295</sup> *Ibid.*

<sup>296</sup> United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, para. 13;

<sup>297</sup> United Nations Committee on the Elimination of Discrimination Against Women and the United Nations Committee on the Rights of the Child, *Joint general Recommendation No. 31 of the Committee on the Elimination of Discrimination Against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices*, CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014, para. 38(a).

<sup>298</sup> *Ibid.*

<sup>299</sup> *Ibid.*, para. 38(b).

<sup>300</sup> United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, para. 13; Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/L.8, 5 December 2011, para. 16.

society regarding harmful practices “through information, formal and informal education and outreach programmes.”<sup>301</sup>

The CEDAWCee recommended States parties in GR No. 14 to introduce appropriate educational and training programmes and seminars based on research findings on the problems arising from FGM/C.<sup>302</sup> In GR No. 19, the CEDAWCee recommended States parties to take effective measures to overcome attitudes, customs and practices that perpetuate VAW; and to introduce education and information programmes to help eliminate prejudices that hinder women’s equality.<sup>303</sup>

The CRCee strongly urged States parties in GC No. 4 to “develop and implement awareness-raising campaigns, education programmes and legislation aimed at changing prevailing attitudes, and address gender roles and stereotypes that contribute to harmful traditional practices.”<sup>304</sup> Further, States parties should facilitate the establishment of multidisciplinary information and advice centres regarding the harmful aspects of FGM/C.<sup>305</sup> The CRCee explains in GC No. 13 that educational measures “should address attitudes, traditions, customs and behavioural practices which condone and promote violence against children.”<sup>306</sup> These educational measures can be initiated and implemented by both the State and civil society actors under the responsibility of the State. The CRCee also gave specific examples of these educational measures, including: “public information programmes, including awareness campaigns, via opinion leaders and the media, to promote positive child-rearing and to combat negative societal attitudes and practices which condone or encourage violence; dissemination of the Convention, the present general comment and State Party reports in child friendly and accessible formats; supporting measures to educate and advise on protection in the context of ICTs.”<sup>307</sup>

One of the strategic objectives of the Beijing Declaration and Platform for Action was to strengthen preventive programmes that promote women’s health.<sup>308</sup> States were asked to give priority to both formal and informal educational programmes that “support and enable women to develop self-esteem, acquire knowledge, make decisions on and take responsibility for their own health, achieve mutual respect in matters concerning sexuality and fertility and educate men regarding the importance of women’s health and well-being,

<sup>301</sup> African Union, *Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa*, 11 July 2003, Article 5.

<sup>302</sup> United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 14: Female Circumcision*, A/45/38, 1990, para. iv.

<sup>303</sup> United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence Against Women*, 1992, para. 24(f).

<sup>304</sup> United Nations Committee on the Rights of the Child, *General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, CRC/GC/2003/4, 1 July 2003, para. 24.

<sup>305</sup> *Ibid.*

<sup>306</sup> United Nations Committee on the Rights of the Child, *General Comment No. 13: The Right of the Child to Freedom from all Forms of Violence*, CRC/C/GC/13, 18 April 2011, para. 44.

<sup>307</sup> *Ibid.*

<sup>308</sup> United Nations, *Beijing Declaration and Platform of Action*, adopted at the Fourth World Conference on Women, 27 October 1995, para. 107.

placing special focus on programmes for both men and women that emphasize the elimination of harmful attitudes and practices, including female genital mutilation.”<sup>309</sup>

The GA emphasized the importance of education and the dissemination of information in raising awareness of the serious consequences of FGM/C and the responsibilities of governments in that regard.<sup>310</sup> The GA therefore called upon States to intensify efforts to raise awareness of and to mobilize international and national public opinion concerning the harmful effects of FGM/C, in particular “through education, the dissemination of information, training, the media and local community meetings, in order to achieve the total elimination of these practices.”<sup>311</sup> Furthermore, the inclusion of the discussion of the empowerment of women and their human rights in the primary and secondary education curricula should be promoted.<sup>312</sup> The GA also called upon States to strengthen advocacy and awareness-raising programmes, as well as formal, non-formal and informal education and training in order to promote “a process of consensus towards the elimination of female genital mutilations.”<sup>313</sup> States are called upon to mobilize boys and girls to take an active part in developing “preventive and elimination programmes to address harmful practices, especially female genital mutilations.”<sup>314</sup> Importantly, States are called upon to allocate increased financial resources to support such efforts.<sup>315</sup>

The GA also called upon States to promote the inclusion of the discussion of the empowerment of women and their human rights in primary and secondary education curricula.<sup>316</sup> More specifically, States are urged to promote “gender-sensitive, empowering educational processes”<sup>317</sup> by reviewing and revising school curricula, educational materials and teacher-training programmes and “elaborating policies and programmes of zero tolerance for violence against girls, including female genital mutilations.”<sup>318</sup> States are also called upon to further integrate “a comprehensive understanding of the causes and consequences of gender-based violence and discrimination against women and

<sup>309</sup> United Nations, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 27 October 1995, para. 107(a).

<sup>310</sup> United Nations General Assembly, *Resolution 52/99 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/52/637, 12 December 1997, para. 2(d).

<sup>311</sup> United Nations General Assembly, *Resolution 53/117 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/53/117, 1 February 1999, para. 3(d); United Nations General Assembly, *Resolution 54/133 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/54/133, 7 February 2000, para. 3(g).

<sup>312</sup> United Nations General Assembly, *Resolution 53/117 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/53/117, 1 February 1999, para. 3 (e); United Nations General Assembly, *Resolution 54/133 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/54/133, 7 February 2000, para. 3(h).

<sup>313</sup> United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, para. 2, 3 and 5.

<sup>314</sup> *Ibid.*, para. 3.

<sup>315</sup> *Ibid.*, para. 3; United Nations General Assembly, *Resolution 62/140 on The Girl Child*, A/RES/62/140, 19 February 2008, para. 29.

<sup>316</sup> United Nations General Assembly, *Resolution 54/133 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/54/133, 7 February 2000, para. 3(h).

<sup>317</sup> United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, para. 6.

<sup>318</sup> *Ibid.*

girls into education and training curricula at all levels.”<sup>319</sup> The GA also called upon States to develop information and awareness-raising campaigns and programmes on the elimination of FGM/C to systematically reach the general public, relevant professionals, families and communities, including through the media and featuring television and radio discussions.<sup>320</sup>

The WHA urged all Member States to accelerate actions towards the elimination of FGM/C, including “education and information necessary for full understanding of the gender, health and human rights dimensions of female genital mutilation.”<sup>321</sup>

### 7.3.8 Training for students and professionals

According to the Beijing Declaration and Programme for Action, gender-sensitive human rights education should be provided to “public officials, including, *inter alia*, police and military personnel, corrections officers, health and medical personnel, and social workers, including people who deal with migration and refugee issues, and teachers at all levels of the educational system, and make available such education and training also to the judiciary and members of parliament in order to enable them to better exercise their public responsibilities.”<sup>322</sup> The CEDAWCee recommended States in GR No. 14 to include in their national health policies “appropriate strategies aimed at eradicating female circumcision in public health care.”<sup>323</sup> Such strategies could include the special responsibility of health personnel, including traditional birth attendants, to explain the harmful effects of FGM/C.<sup>324</sup> In GR No. 24, the CEDAWCee explains that the obligation to protect rights relating to women’s health requires States Parties to ensure “gender-sensitive training to enable health-care workers to detect and manage the health consequences of gender-based violence.”<sup>325</sup> The Committee on Economic, Social and Cultural Rights (CESCR) explains in GC No. 16 that the right of everyone to the enjoyment of the highest attainable standard of physical and mental health requires States to provide adequate training for health care workers to deal with women’s health issues.<sup>326</sup> The GA also emphasized the importance of adequate training of health-care providers at all levels on the harmful consequences of FGM/C.<sup>327</sup>

<sup>319</sup> United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, para. 6.

<sup>320</sup> *Ibid.*, para. 9.

<sup>321</sup> World Health Organization, *World Health Assembly Resolution on Female Genital Mutilation*, WHA61.16, 24 May 2008, para. 1(1).

<sup>322</sup> United Nations, *Beijing Declaration and Platform of Action*, adopted at the Fourth World Conference on Women, 27 October 1995, para. 232(i).

<sup>323</sup> United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 14: Female Circumcision*, A/45/38, 1990, para. (b).

<sup>324</sup> *Ibid.*

<sup>325</sup> UN Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, 1999, A/54/38/Rev.1, chap. I, para. 15 (b).

<sup>326</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights*, E/C.12/2005/4, 11 August 2005, para. 29.

<sup>327</sup> United Nations General Assembly, *Resolution 53/117 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/53/117, 1 February 1999, para. 3(e). United Nations General Assembly, *Resolution 54/133 on Traditional or Customary Practices affecting the Health of Women and*

The training for health personnel should specifically address “the increased vulnerability of women and girls to HIV/AIDS and other sexually transmitted infections” due to FGM/C.<sup>328</sup> The GA called upon States to develop, support and implement the training of “social workers, medical personnel, religious and community leaders and other relevant professionals” and ensure that they provide competent, supportive services and care to girls and women who are at risk of FGM/C and to girls and women who have undergone FGM/C.<sup>329</sup> In addition, the CSW called upon States to compel these professionals to report cases to the appropriate authorities where they believe girls or women are at risk.<sup>330</sup>

### 7.3.9 Role of CSOs

The Vienna Declaration and Programme of Action recognized the important role of CSOs in the promotion of all human rights and in humanitarian activities at national, regional and international levels in general.<sup>331</sup> CEDAW GC No. 14 recommends States parties to support women’s organizations at the national and local levels working for the elimination of FGM/C.<sup>332</sup> The GA also specifically welcomed the work carried out by CSOs in raising awareness of the harmful effects of FGM/C.<sup>333</sup> The GA and the Special Rapporteur on VAW recommend States to recognize the important role that CSOs play in the elimination of FGM/C and to give “vigorous support”<sup>334</sup> and “all necessary support and encouragement”<sup>335</sup> to the efforts of civil society organizations, community organizations, women’s groups and women’s organizations. The importance of the work of CSOs is emphasized in several other human rights documents as well.<sup>336</sup> The Special Rapporteur on VAW stated for example: “the involvement of local women’s groups and civil society in the movement to

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Girls, A/RES/54/133, 7 February 2000, para. 3(e); United Nations General Assembly, *Resolution 56/128 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/56/128, 30 January 2002, para. 3(f).

<sup>328</sup> United Nations General Assembly, *Resolution 56/128 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/56/128, 30 January 2002, para. 3(g).

<sup>329</sup> United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, para. 15; See also Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/L.8, 5 December 2011, para. 18.

<sup>330</sup> *Ibid.*

<sup>331</sup> United Nations General Assembly, *Vienna Declaration and Programme of Action*, A/CONF.157/23, 12 July 1993, para. 38.

<sup>332</sup> United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 14: Female Circumcision*, A/45/38, 1990.

<sup>333</sup> United Nations General Assembly, *Resolution 52/99 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/52/637, 12 December 1997, para. 1(f).

<sup>334</sup> *Ibid.*, para. (f); United Nations Population Fund, *Report of the International Conference on Population and Development*, Cairo, A/CONF.171/13/Rev.1, 5-13 September 1994, para. 4.22, 124 and 232(h).

<sup>335</sup> United Nations Commission on Human Rights, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences on Cultural practices in the Family that are Violent towards Women*, E/CN.4/2002/83, 31 January 2002, para. 132.

<sup>336</sup> United Nations General Assembly, *Resolution 52/99 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/52/637, 12 December 1997, para. 3(f); Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2012/8, 5 December 2011, para. 49; World Health Organization, *World Health Assembly Resolution on Female Genital Mutilation*, WHA61.16, 24 May 2008, para. 1(4).

eradicate harmful practices is the only guarantee that the practice will not re-emerge in the future."<sup>337</sup>

### 7.3.10 Support services

The Maputo Protocol obliges States Parties to protect women who are at risk of FGM/C and to provide necessary support to victims of FGM/C "through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting."<sup>338</sup> The CRCEE explains in GC No. 4 that States Parties have an obligation to protect adolescents from all harmful traditional practices, including FGM/C.<sup>339</sup> In addition, the CESCR explains in GC No. 14 that the obligation to protect the right to health includes that States are obliged to ensure that: (i) FGM/C does not interfere with access to pre- and post-natal care and family planning; and (ii) to prevent third parties from coercing women to undergo FGM/C.<sup>340</sup>

The GA has urged States as well to protect and support women and girls who have been subjected to FGM/C and those at risk, including "by developing social and psychological support services and care, and to take measures to improve their health, including sexual and reproductive health, in order to assist women and girls who are subjected to the practice."<sup>341</sup> The establishment and reinforcement of social and psychological support services and care to respond to the needs of FGM/C victims by developing comprehensive and accessible sexual and reproductive health services has been reiterated in other human rights documents.<sup>342</sup> States have been urged to develop age-appropriate safe and confidential programmes and medical, social and psychological support services to assist girls who are subjected to violence,<sup>343</sup> which should – according to the ICPD Programme of Action – include counselling for women and men to discourage FGM/C.<sup>344</sup>

<sup>337</sup> United Nations Commission on Human Rights, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences on Cultural practices in the Family that are Violent towards Women*, E/CN.4/2002/83, 31 January 2002, para. 113.

<sup>338</sup> African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003, Article 5(c) and 5(d).

<sup>339</sup> United Nations Committee on the Rights of the Child, *General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, CRC/GC/2003/4, 1 July 2003, para. 39(g).

<sup>340</sup> United Nations Human Rights Committee, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, E/C.12/2000/4, 11 August 2000, para. 35.

<sup>341</sup> United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, para. 5; Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/L.8, 5 December 2011, para. 14; World Health Organization, *World Health Assembly Resolution on Female Genital Mutilation*, WHA61.16, 24 May 2008, para. 1(6).

<sup>342</sup> United Nations General Assembly, *Resolution 54/133 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/54/133, 7 February 2000, para. 3(e); United Nations General Assembly, *Resolution 56/128 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/56/128, 30 January 2002, para. 3(f).

<sup>343</sup> United Nations General Assembly, *Resolution 58/156 on The Girl Child*, A/RES/58/156, 26 February 2004, para. 9; United Nations General Assembly, *Resolution 58/156 on The Girl Child*, A/RES/58/156, 26 February 2004, para. 9; United Nations General Assembly, *Resolution 60/141 on The Girl Child*, A/RES/60/141, 11 January 2006, para. 9; United Nations General Assembly,

The Secretary-General recommended that victims of FGM/C should be provided with a range of specialized services, including legal, psychological, social assistance and health services to ensure their recovery from trauma and the prevention of serious health conditions.<sup>345</sup> Both the Secretary-General and the Special Rapporteur on VAW have called for specialized shelter services for women and girls at risk of FGM/C.<sup>346</sup> The report of the Special Rapporteur on VAW noted: “While shelters are generally associated with intimate partner violence, such sanctuary is also required by girls and young women escaping, for example, [...] female genital mutilation.”<sup>347</sup>

### 7.3.11 *Involve all actors*

States are called upon to engage a wide range of stakeholders, including law-enforcement and judicial personnel, immigration officials, health-care providers, national independent human rights institutions, civil society, community and religious leaders, teachers, employers, media professionals and those directly working with girls, as well as parents, families and communities who engage in FGM/C to work together in strategies aimed at eliminating FGM/C.<sup>348</sup>

The most recent GA Resolution urged States to “pursue a comprehensive, culturally sensitive, systematic approach that incorporates a social perspective and is based on human rights and gender-equality principles in providing education and training to families, local community leaders and members of all professions relevant to the protection and empowerment of women and girls in order to increase awareness of and commitment to the elimination of female genital mutilations.”<sup>349</sup> Other human rights documents similarly mention the importance of a comprehensive, coordinated, multidisciplinary, systematic approach based on human rights; an integrated strategy for the prevention and elimination of FGM/C; and the involvement of multiple stakeholders at all levels.<sup>350</sup> The GA reaffirmed that the elimination of FGM/C can only be

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*Resolution 62/140 on The Girl Child*, A/RES/62/140, 19 February 2008, para. 13; United Nations General Assembly, *Resolution 66/140 on The Girl Child*, A/RES/66/140, 27 March 2012, para. 24.

<sup>344</sup> United Nations Population Fund, *Report of the International Conference on Population and Development*, Cairo, A/CONF.171/13/Rev.1, 5-13 September 1994, para. 7.40.

<sup>345</sup> Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/6, 3 December 2009, para. 43; Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2012/8, 5 December 2011, para. 52;

<sup>346</sup> Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/6, 3 December 2009, para. 41; United Nations Human Rights Council, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences on Indicators on Violence Against Women and State Response*, A/HRC/7/6, 29 January 2008, para. 98.

<sup>347</sup> *Ibid.*

<sup>348</sup> United Nations Committee on the Elimination of Discrimination Against Women and the United Nations Committee on the Rights of the Child, *Joint general Recommendation No. 31 of the Committee on the Elimination of Discrimination Against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices*, CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014, para. 35; United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, para. 2.

<sup>349</sup> *Ibid.*, para. 10.

<sup>350</sup> Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/L.8, 5 December 2011, para. 8 and 18; Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/6, 3 December 2009, para. 38;

achieved as a result of “a comprehensive movement that involves all public and private stakeholders in society, including girls and boys, women and men.”<sup>351</sup> Especially men’s understanding of their role and responsibilities with regard to promoting the elimination of FGM/C is emphasized by the GA.<sup>352</sup> In addition, States have been recommended by the CEDAWCee in GR No. 14 to encourage politicians, professionals, religious and community leaders at all levels, including the media and the arts, to co-operate in influencing attitudes towards the elimination of FGM/C.<sup>353</sup>

States have also been called upon to involve diverse actors in advocacy and awareness-raising campaigns, including public opinion leaders, educators, religious leaders, chiefs, traditional leaders (both community and religious), medical practitioners, teachers, women’s health and family planning organizations, social workers, health care providers, child care agencies, non-governmental organizations, arts organizations and the media. The objective is to promote both collective and individual awareness of the human rights of women and girls and of how harmful practices violate those rights. Groups and individuals working directly with girls, as well as parents, families and communities are also urged to participate in such campaigns.<sup>354</sup> The Secretary-General wrote in his report that “the integral role of communities in the abandonment of female genital mutilation should be recognized and community-based abandonment initiatives supported.”<sup>355</sup>

### 7.3.12 Alternatives

States are called upon to explore, through consultations with communities and religious and cultural groups and their leaders, alternatives to FGM/C, in particular where FGM/C is part of a ritual ceremony or rite of passage.<sup>356</sup> With

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Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2012/8, 5 December 2011, para. 47, 50 and 54; United Nations Human Rights Council, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences on Intersections between Culture and Violence Against Women*, A/HRC/4/34, 17 January 2007, para. 31.

<sup>351</sup> United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, preamble; Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/L.8, 5 December 2011, preamble.

<sup>352</sup> United Nations General Assembly, *Resolution 54/133 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/54/133, 7 February 2000, para. 3(i); United Nations General Assembly, *Resolution 56/128 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/56/128, 30 January 2002, para. 3(k).

<sup>353</sup> United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 14: Female Circumcision*, A/45/38, 1990.

<sup>354</sup> United Nations General Assembly, *Resolution 54/133 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/54/133, 7 February 2000, para. 3(j); United Nations General Assembly, *Resolution 56/128 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/56/128, 30 January 2002, para. 3(i); United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, para. 3; United Nations General Assembly, *Traditional or Customary Practices Affecting the Health of Women and Girls: Report of the Secretary-General*, A/56/316, 22 August 2001, para. 40.

<sup>355</sup> Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/6, 3 December 2009, para. 41.

<sup>356</sup> United Nations General Assembly, *Resolution 56/128 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/56/128, 30 January 2002, para. 3(m); United Nations General



regard to those cutters who perform the procedure, States are called upon, “as part of a comprehensive approach”<sup>357</sup> to eliminate FGM/C, to support and provide alternative training and education possibilities.<sup>358</sup> These training and education programmes have the aim to adopt an “alternative profession”<sup>359</sup> or “alternative livelihoods”<sup>360</sup> in order to provide cutters with an alternative source of income.<sup>361</sup>

#### 7.4 Action to be taken by non-State actors in relation to the elimination of FGM/C

Human rights documents do not only address States, but also other actors, including, among others, ‘the international community’, ‘UN entities’, ‘the UN system’, ‘UN treaty bodies’, ‘civil society’, international financial institutions, ‘regional and sub-regional organizations’ and ‘all stakeholders’. Although the focus of the research is on *State* compliance, in order to provide a comprehensive overview of the obligations and recommendations that follow from the human rights framework, the obligations and recommendations that directed to non-State actors will be shortly addressed below.

##### 7.4.1 Continue to support programmes

In the first place, the GA called upon the international community, the relevant UN entities and civil society and international financial institutions “to continue to actively support, through the allocation of increased financial resources and technical assistance, targeted comprehensive programmes that address the needs and priorities of women and girls at risk of or subjected to female genital mutilations.”<sup>362</sup> More specifically, the GA called upon the international community to strongly support a second phase of the ‘UNFPA-UNICEF Joint

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Assembly, *Resolution 54/133 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/54/133, 7 February 2000, para. 3(l).

<sup>357</sup> Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/L.8, 5 December 2011, para. 19.

<sup>358</sup> United Nations General Assembly, *Resolution 56/128 on Traditional or Customary Practices affecting the Health of Women and Girls*, A/RES/56/128, 30 January 2002, para. 3(m); Report of the Secretary-General on Traditional or customary practices affecting the health of women and girls (A/53/354, of 10 September 1998), para. 14; Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/6, 3 December 2009, para. 42.

<sup>359</sup> United Nations General Assembly, *Resolution 62/140 on The Girl Child*, A/RES/62/140, 19 February 2008, para. 29; United Nations General Assembly, *Resolution 66/140 on The Girl Child*, A/RES/66/140, 27 March 2012, para. 45.

<sup>360</sup> Economic and Social Council, *Ending Female Genital Mutilation: Report of the Secretary-General*, E/CN.6/2010/L.8, 5 December 2011, para. 19; United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, para. 16.

<sup>361</sup> United Nations General Assembly, *Resolution 62/140 on The Girl Child*, A/RES/62/140, 19 February 2008, para. 29; Report of the Secretary-General on Traditional or customary practices affecting the health of women and girls (A/53/354, of 10 September 1998), para. 55.

<sup>362</sup> United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, para. 17; United Nations General Assembly, *Resolution 66/140 on The Girl Child*, A/RES/66/140, 27 March 2012, para. 45; United Nations General Assembly, *Resolution 60/141 on The Girl Child*, A/RES/60/141, 11 January 2006, para. 18.

Programme on Female Genital Mutilation/Cutting: Accelerating Change' as well as national programmes focused on the elimination of FGM/C.<sup>363</sup>

#### *7.4.2 Promote human rights education*

In the second place, the GA also called upon States, civil society (including the media and NGOs) "to promote human rights education and full respect for and the enjoyment of the human rights of the girl child, inter alia, through the translation, production and dissemination of age-appropriate and gender-sensitive information material on those rights to all sectors of society, in particular to children."<sup>364</sup>

#### *7.4.3 Take FGM/C into account in country programmes*

In the third place, the GA requested the Secretary-General to ensure that "all relevant organizations and bodies of the United Nations system, in particular the United Nations Population Fund, the United Nations Children's Fund, the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), the World Health Organization, the United Nations Educational, Scientific and Cultural Organization, the United Nations Development Programme and the Office of the United Nations High Commissioner for Human Rights, individually and collectively, take into account the protection and promotion of the rights of women and girls against female genital mutilations in their country programmes, as appropriate and in accordance with national priorities, in order to further strengthen their efforts in this regard."<sup>365</sup>

#### *7.4.4 Observe 6 February as 'International Day of Zero Tolerance for Female Genital Mutilation'*

In the fourth place, the GA called upon States, the UN system, civil society and all stakeholders to observe 6 February as the 'International Day of Zero Tolerance for Female Genital Mutilation' and to use the day to enhance awareness-raising campaigns and to take concrete actions against FGM/C.<sup>366</sup>

## **8 CONCLUSION**

The practice of FGM/C is framed within a human rights framework, viewing the practice as a form of VAW and classified as a human rights violation. The international community recognized that the following human rights are being violated by FGM/C: (i) the right to be free from gender-discrimination; (ii) the right to life; (iii) the right to the highest attainable standard of health; (iv) the right to freedom from torture or cruel, inhuman or degrading treatment or

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<sup>363</sup> United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, para. 18.

<sup>364</sup> United Nations General Assembly, *Resolution 66/140 on The Girl Child*, A/RES/66/140, 27 March 2012, para. 37.

<sup>365</sup> United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, para. 22.

<sup>366</sup> *Ibid.*, para. 21.

punishment and (v) the rights of the child.<sup>367</sup> These five human rights are protected in various international and regional human rights instruments, including the ICESCR, ICCPR, CEDAW, CAT, CRC, ACHPR, ACHWC, AYC and the Maputo Protocol.

This chapter also illustrated that conflicts between human rights can arise when supporters of FGM/C invoke the following human rights: (i) the right to culture; (ii) minority rights; and (iii) the right to religious freedom. These rights are protected in the same human rights instruments, including the UDHR, ICESCR, ICCPR, ACHPR. However, these three human rights are not absolute and the human rights framework allows for limitations of these rights. Since FGM/C ‘destroys’ other rights – more precisely the five rights mentioned above – the human rights framework does not allow persons to invoke other human rights to suggest that FGM/C should not be eliminated.

States have a due diligence obligation to prevent, protect, investigate, prosecute and punish those responsible, including private individuals for human rights violations. Although private individuals practice FGM/C (rather than State officials), States are still responsible for these private acts, if they fail to act with due diligence to prevent, investigate and, in accordance with national legislation, punish acts of VAW in general and FGM/C in particular. States have a duty to take action in order to eliminate FGM/C. Table 4.3 provides an overview of the obligations and recommendations for States that are especially relevant in relation to the elimination of FGM/C.

Table 4.3 Obligations and recommendations for States

Obligations:	Recommendations:
Take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. (Art. 2(f) CEDAW)	Sign and ratify all human rights treaties, in particular the CEDAW, CRC, and its optional protocols (and withdraw reservations).
Commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men. (Art. 2(2) Maputo Protocol)	Include information in periodic reports about measures taken to eliminate FGM/C.  Enact and enforce legislation against FGM/C.  Establish national mechanism for implementation and monitoring of legislative frameworks against FGM/C.  Review, and, where appropriate, revise, amend or abolish all laws, regulations, policies, practices and customs that

<sup>367</sup> World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008, p. 1 and p. 9.

Take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. (Art. 5(a) CEDAW)

Take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. (Art. 24(3) CRC)

Take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: (a) those customs and practices prejudicial to the health or life of the child; and (b) those customs and practices discriminatory to the child on the grounds of sex or other status. (Art. 21(1) ACRWC)

Take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services (Art. 12(1) CEDAW)

Prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including: creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes; prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them; provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting; protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance. (Art. 5 Maputo Protocol)

discriminate against women or have a discriminatory impact on women.

Develop comprehensive and multidisciplinary policies and National Action Plans aimed at eliminating FGM/C.

Collect and disseminate basic data about the prevalence, trends, attitudes and behaviour regarding FGM/C, as well as on reported cases and enforcement of legislation.

Introduce appropriate educational and training programmes and seminars.

Develop and implement awareness raising campaigns, education programmes and legislation aimed at changing prevailing attitudes, and address gender roles and stereotypes that contribute to harmful traditional practices.

Intensify efforts to raise awareness of and to mobilize international and national public opinion concerning the harmful effects of FGM/C, in particular "through education, the dissemination of information, training, the media and local community meetings, in order to achieve the total elimination of these practices.

Promote the inclusion of the discussion of the empowerment of women and their human rights in primary and secondary education curricula.

Provide adequate training for students and professionals.

Support and recognize important role of CSOs.

Develop social and psychological support services and care, and to take measures to improve their health, including sexual and reproductive health, in order to assist women and girls who are subjected to the practice.

Engage a wide range of stakeholder to work together in strategies aimed at eliminating FGM/C.

Explore alternatives to FGM/C.

Submit reports to treaty monitoring bodies.

Embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle. (Art. 2(a) CEDAW)

## **PART III**

### **EMPIRICAL ANALYSIS**



# CHAPTER V

## FGM/C IN SENEGAL: A CASE STUDY

### 1 INTRODUCTION

The previous chapter showed that FGM/C is classified as a form of VAW and considered a human rights violation. A comprehensive human rights framework exists at both the international and regional levels that addresses VAW and harmful practices in general, and FGM/C in particular. A global goal has been set by the UN to end the practice of FGM/C within a generation.<sup>1</sup> Although the human rights framework has been developed at the international level, the work on eliminating FGM/C must be done at the national level. The challenge to ensure that these human rights standards are translated into effective action, and bring positive change to the girls and women (at risk of) undergoing this practice, remains at the national level. This chapter aims to illustrate whether, and to what extent, Senegal is in compliance with the human rights framework in relation to FGM/C. In addition, this chapter aims to provide a better understanding of the possible problems that come to the surface when the human rights framework in relation to FGM/C is being implemented at the national level. The factors that influence compliance (and non-compliance) positively and/or negatively will be highlighted.

The structure of this chapter is as follows. The research question is spelled out in section 2 and the design and methodology is elaborated upon in section 3. A country profile of Senegal is sketched in sections 4 and 5 for background and context purposes. Furthermore, section 6 spells out the ratification behaviour of Senegal. Section 7 and 8 examine the existing monitoring mechanisms, including the Treaty Monitoring Bodies (TMBs) and the Universal Periodic Review (UPR). Section 9 elaborates upon the national human rights institutions and section 9 on the constitutional guarantees. Section 10 to 19 present the empirical findings in relation to the 'compliance question' in Senegal. Section 20 draws up conclusions.

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<sup>1</sup> United Nations General Assembly, *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations*, A/RES/67/146, 5 March 2013, para. 19; World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008, p. 21.



## 2 RESEARCH QUESTION

The research question that guided the empirical study in Senegal is the following: *“To what extent is Senegal in compliance with the human rights framework in relation to Female Genital Mutilation/Cutting, and which factors explain compliance and/or non-compliance with this framework?”*

## 3 METHODOLOGY

### 3.1 Research design

This empirical study used a qualitative case study research strategy with a socio-legal approach. The research was exploratory in nature. A qualitative approach was considered to be appropriate, “because of its attention to detail, complexity and contextuality.”<sup>2</sup> A qualitative approach suited the intention of this research to offer a thorough understanding of the complex process of compliance with the human rights framework at the national level in relation to FGM/C. According to Hancock et al, “qualitative research attempts to explore a host of factors that may be influencing a situation”<sup>3</sup> and that is exactly the intention of this research. Taking into account the nature of the research question, a case study research strategy was considered to be appropriate. Case study methodologies are flexible and allow for studying complex situations. As Mills explains, “these flexible methodologies are beneficial as it gives researchers the ability to be as general or as specific as is felt appropriate in order to capture adequate detail.”<sup>4</sup> The main data collection methods were desk research (section 3.2) and semi-structured interviews (section 3.3.1). These multiple data sources resulted in a wealth of rich information.

### 3.2 Desk research

An extensive a priori desk study of existing documents concerning FGM/C in Senegal was conducted from January 2013 until August 2015. The desk research was not limited to the English language, but literature and documents in the French language were included in the search as well.

In the first place, the Demographic and Health Surveys (DHS) and Multiple Indicator Cluster Surveys (MICS) that were conducted in Senegal were analysed in order to gain a better understanding of the phenomenon of FGM/C in Senegal. These Surveys provide extensive data on the prevalence and nature of FGM/C, including: knowledge about FGM/C; type of FGM/C; age on which girls undergo FGM/C; practitioners that perform FGM/C; and beliefs and opinions about FGM/C.

In the second place, the national reports that the Senegalese government submitted to the subsequent treaty bodies that monitor implementation of the

<sup>2</sup> J. Mason, *Qualitative Researching*, SAGE, 2002, p. 175.

<sup>3</sup> D.R. Hancock et al., *Doing Case Study Research*, Teachers College Press, Columbia University, New York, 2006, p. 8.

<sup>4</sup> A.J. Mills et al, *Encyclopedia of Case Study Research*, Sage Publications, 2009, p. 99-100.

“core” UN and AU human rights instruments were thoroughly studied. As described in the previous chapter, States Parties to treaties are under the obligation to submit periodic reports to the relevant treaty body on how the rights in the treaty are being implemented. Senegal participated regularly in the process of State reporting and the Senegalese government addressed the issue of FGM/C frequently in its national reports. Analyzing these reports provided a first glimpse of the human rights situation in Senegal in general as well as a general idea of the actions taken in the field of FGM/C. In addition, the ‘concluding observations’ of the monitoring bodies and international supervisory institutions were analyzed in order to read how they assessed Senegal’s performance towards eliminating FGM/C. The same applies for the National Reports that Senegal submitted to the Working Group on the Universal Periodic Review (UPR) of the Human Rights Council. In these reports, Senegal stated what actions they had taken to improve the human rights situations in their country and to fulfil their human rights obligations. Especially when Senegal was reviewed for the second time in October 2013, FGM/C was frequently mentioned in reports and during the procedures. Therefore, it was essential to study the UPR documents in order to gain a better understanding of the action taken in the field of FGM/C in Senegal.

Thirdly, the desk research also focused on the search for academic literature, such as journal articles, books and dissertations about FGM/C in Senegal. The following search terms in the English language were used: ‘female genital mutilation/cutting’, ‘FGM/C’, ‘female genital mutilation’, ‘FGM’, ‘female genital cutting’, ‘FGC’, ‘female circumcision’, ‘FC’, ‘circumcision’, ‘harmful practice’, ‘harmful’, ‘practice’, ‘custom’, ‘customary practice’, ‘tradition’, ‘traditional’, ‘traditional practice’, ‘traditional custom’, ‘cultural practice’, ‘culture’, ‘social practice’, ‘female sexual mutilation’, ‘sexual mutilation’, ‘mutilation’, ‘female genital operations’, ‘genital operations’ and ‘Senegal.’ The following search terms in the French language were used: ‘mutilation génitales féminines/excision’, ‘MGF/E’, ‘mutilations génitales féminines’, ‘MGF’, ‘l’excision’, ‘excision’, ‘circoncision féminine’, ‘CF’, ‘circoncision’, ‘pratique néfaste’, ‘néfaste’, ‘pratique’, ‘coutume’, ‘pratique coutumière’, ‘tradition’, ‘traditionnelle’, ‘pratique traditionnelle’, ‘coutume traditionnelle’, ‘pratique culturelle’, ‘culture’, ‘pratique sociale’, ‘mutilation sexuelle féminine’, ‘mutilations sexuelles’, ‘mutilation’, ‘opérations génitales féminines’, ‘opérations génitales’ and ‘Sénégal.’ I entered combinations of these search terms into several electronic databases, including Worldcat, Heinonline, Westlaw, Jstore, Lexis, Web of Science and Sage Journals Online. In addition, citation indexes (such as SSRN) were searched. In order to be comprehensive, I also conducted a search on the web, using search engines (such as Google Scholar) to search for literature. In addition, the so-called ‘snowballing effect’ was a helpful tool as well to find more academic literature on the topic. All academic literature relevant in relation to FGM/C in Senegal was included in the document analysis.

In the fourth place, the desk research also focused on the search for reports and evaluations of CSOs (such as Tostan) and international organizations (such as UNICEF and UNFPA) about FGM/C in Senegal. These reports provided practical information about the role of the Senegalese government, the role of

civil society organizations at the community level and the role of the UNICEF-UNFPA Joint Programme in Senegal.

In the fifth place, the national legal framework in relation to FGM/C was mapped. Therefore, applicable national laws (including Act No. 99-05 of 29 January 1999) were studied, as well as the Senegalese constitution (including amendments).

Lastly, a search on the Internet was conducted in order to find (non-academic) articles – or so-called ‘grey literature’ and blogs – about (recent) developments concerning FGM/C in Senegal to make sure all (and the most up-to-date) information was included in the study. The same search terms were used.

### 3.3 Fieldwork in Senegal

During a period of 4.5 months (September 2013 until February 2014) the field research was conducted in Senegal. A two-week pilot study in Dakar was conducted in May 2013 to map out the field and prepare for the subsequent field research period.

#### 3.3.1 *Semi-structured interviews*

Semi-structured in-depth interviewing represented the primary method of data collection during the fieldwork in Senegal. In-depth interviews were optimal for collecting data on respondents’ personal perspectives and experiences. Unlike structured interviews – which follow a rigid format of set questions – semi-structured interviews are conducted with a fairly open framework that allows two-way communication.<sup>5</sup> The semi-structured interviews were informal in tone and focused on specific themes that provided a degree of flexibility to explore a certain theme more in detail. The semi-structured format facilitated a flowing discussion and allowed for an open response in the respondents’ own words rather than a ‘yes or no’ type answer.<sup>6</sup> The interviews unfolded in a conversational manner offering respondents the chance to explore issues they felt were important. This method of data collection allowed new ideas to be brought up during the interview. An interview guide was prepared that included a list of themes and questions that were covered during the interviews.

#### 3.3.2 *Development of the interview guide*

No specific instrument exists that assesses compliance with the human rights framework in relation to FGM/C. Endeavours to properly evaluate and monitor the efforts of States with regard to FGM/C have been limited. However, recent developments in relation to developing ‘human rights indicators’ are highly relevant for this research and provided a source of inspiration when developing the interview guide. The purpose of these human rights indicators is “to monitor compliance with international human rights treaties with a view to evaluating progress towards the realization of human

<sup>5</sup> D.W. Stacks, *Primer of Public Relations Research*, Guilford Press, 2010, p. 347.

<sup>6</sup> N. Clifford, et al., *Key Methods in Geography*, SAGE, 2010, p. 105.

rights.”<sup>7</sup> The pioneering work of the Office of the United Nations High Commissioner for Human Rights (OHCHR) is essential in this regard. At the request of UN Treaty Monitoring Bodies, the OHCHR has developed a framework for human rights indicators as well as lists of illustrative indicators relating to several human rights.<sup>8</sup> The OHCHR identified three categories of human rights indicators: structural,<sup>9</sup> process,<sup>10</sup> and outcome<sup>11</sup> indicators. Experts in the area of human rights indicators have generally accepted this methodology.<sup>12</sup> While structural indicators measure *de jure* compliance with international human rights treaties, process and outcome indicators measure *de facto* compliance.<sup>13</sup> Another source of inspiration for the development of the interview guide were the efforts of Ertürk, Special Rapporteur on VAW, in relation to the development of indicators on Violence Against Women (VAW) and measuring States’ responses to combat VAW.<sup>14</sup> In her report of 25 February 2008, Yakin Ertürk responds to the call in Resolution 2004/46<sup>15</sup> of the Commission on Human Rights and proposes indicators on VAW and on measures taken by States to eliminate VAW. In her report, she stated the

<sup>7</sup> G. de Beco, Human Rights Indicators: From Theoretical Debate to Practical Application, *Journal of Human Rights Practice*, Volume 5, No. 2, 2013, p. 2.

<sup>8</sup> United Nations Office of the High Commissioner for Human Rights, *Report on Indicators for Monitoring Compliance with International Human Rights Instruments*, HRI/MC/2006/7, 11 May 2006; United Nations Office of the High Commissioner for Human Rights, *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*, HRI/MC/2008/3, 6 June 2008; United Nations Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation*, HR/PUB/12/5, 2012, available at [http://www.ohchr.org/Documents/Publications/Human\\_rights\\_indicators\\_en.pdf](http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf).

<sup>9</sup> Structural indicators measure a state’s intention to abide by international human rights law, examining the ratification of international human rights treaties and their incorporation into domestic legislation.

<sup>10</sup> Process indicators measure the efforts undertaken by states to implement human rights, identifying what steps states have taken to meet their human rights obligations.

<sup>11</sup> Outcome indicators measure a state’s human rights performance, evaluating the results of its human rights policies.

<sup>12</sup> G. de Beco, Human Rights Indicators: From Theoretical Debate to Practical Application, *Journal of Human Rights Practice*, Volume 5, No. 2, 2013, p. 2.

<sup>13</sup> T. Landman and J. Häusermann, *Map-Making and Analysis of the Main International Initiatives on Developing Indicators on Democracy and Good Governance*, University of Essex, Human Rights Centre, Final Report, July 2003, p. 5-6; G. de Beco, Human Rights Indicators for Assessing State Compliance with International Human Rights, *Nordic Journal of International Law*, Volume 77, No. 1-2, 2008, p. 42-43.

<sup>14</sup> For more information, see United Nations Division for the Advancement of Women, the United Nations Economic Commission for Europe and the United Nations Statistical Division, *Report of the Expert Group on Indicators to Measure Violence Against Women*, 8-10 October 2007, Geneva, Switzerland, p. 5, available at [http://www.un.org/womenwatch/daw/egm/IndicatorsVAW/IndicatorsVAW\\_EGM\\_report.pdf](http://www.un.org/womenwatch/daw/egm/IndicatorsVAW/IndicatorsVAW_EGM_report.pdf)

[Last Accessed 1 October 2015]; United Nations Human Rights Council, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences on Indicators on Violence Against Women and State Response*, A/HRC/7/6, 29 January 2008; United Nations Human Rights Council, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences on The Next Step: Developing Transnational Indicators on Violence Against Women*, A/HRC/7/6/Add.5, 25 February 2008; United Nations Economic and Social Council, *Report of the Friends of the Chair of the United Nations Statistical Commission on the Indicators on Violence Against Women*, E/CN.3/2009/13, 11 December 2008.

<sup>15</sup> United Nations Commission on Human Rights, *Commission on Human Rights Resolution 2004/46: Elimination of Violence Against Women*, E/CN.4/RES/2004/46, 20 April 2004.

following: “It [a set of indicators on VAW] does not claim to resolve long-standing academic debates on how to define and measure forms of violence. Rather, issues and questions that are often neglected are considered and proposals on measuring violence against women and State response are suggested.”<sup>16</sup> In her report, she refers to the work and typology of the OHCHR<sup>17</sup> and she further proposes two sets of indicators. In the first place, the Special Rapporteur on VAW refers to “indicators for measuring VAW.” In the second place, she refers to indicators on measures taken by Member States to eliminate VAW, so-called “indicators for State responses.”

Despite these numerous initiatives, not only in the field of VAW but also for example in relation to the right to education,<sup>18</sup> most human rights indicator sets have never been applied, mainly because their great complexity.<sup>19</sup> However, building on the work of Ertürk in relation to indicators on VAW, an instrument to assess a country’s level of performance regarding the prevention of FGM/C was drafted in 2009 by the International Centre for Reproductive Health of Ghent University in collaboration with the Institute for Human Rights of the University of Valencia, the Committee for the Abolition of Sexual Mutilation (*Commission pour l’Abolition des Mutilations Sexuelles*) and the Foundation for Women’s Health, Research and Development.<sup>20</sup> This instrument contains indicators that can be used to measure commitments and efforts of a country regarding the prevention of FGM/C, and in extension, of all forms of sexual and gender based violence.<sup>21</sup> The Assessment Tool aims to give a clear overview of the level of efforts and commitments in any given country. In addition, it provides an insight into the various country approaches and ongoing initiatives to bring FGM to a halt. Overall, the application of the instrument would facilitate a coordinative approach, and simultaneously provide NGOs and other interest groups with a tool to pressure governments to take action. This Country Assessment Tool has not yet been tested and validated, and needs further development. According to the authors, it needs to be worked out further with legal experts, academics and UN agencies.<sup>22</sup> Lastly, two other documents were used as a source of inspiration when developing the interview guide, namely the Supplement to the Handbook for Legislation on Violence

<sup>16</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences on Indicators on Violence Against Women and State Response*, A/HRC/7/6, 29 January 2008, para. 23.

<sup>17</sup> *Ibid.*, para. 28.

<sup>18</sup> Chapman, A., *Development of Indicators for Economic, Social and Cultural Rights: The rights to Education, Participation in Cultural Life and Access to the Benefits of Science*, in: Y. Donders and V. Volodin (eds), *Human Rights in Education, Science and Culture: Legal Developments and Challenges*, UNESCO Publishing, 2007, p. 111–51; S. Kalantry et al., *Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR*, Cornell Law Faculty Publications, Paper 1076, 2010.

<sup>19</sup> G. de Beco, *Human Rights Indicators: From Theoretical Debate to Practical Application*, *Journal of Human Rights Practice*, Volume 5, No. 2, 2013, p. 3.

<sup>20</sup> For more information, see E. Leye and A. Sabbe, *Responding to Female Genital Mutilation in Europe: Striking the Right Balance Between Prosecution and Prevention*, International Center for Reproductive Health, Ghent University, June 2009.

<sup>21</sup> *Ibid.*, p. 58.

<sup>22</sup> *Ibid.*

Against Women: “Harmful Practices” against Women<sup>23</sup> developed by UN Women in 2012 and the checklist for the development of laws on FGM/C<sup>24</sup> developed by UNICEF in 2010. The purpose of this checklist is to suggest issues to consider while drafting laws on FGM/C. Components of the checklist are for example: contextual analysis, definitions and guiding principles, prevention of FGM/C, support and assistance for victims, punishment of perpetrator, implementation and evaluation. Policy makers, lawmakers, development practitioners and others responsible for legislative reform in relation to FGM/C are intended to use the checklist.<sup>25</sup>

Although still in its infancy, the undertakings in relation to human rights indicators described above provided valuable input and inspiration for the development of the interview guide for the case study in Senegal. When drafting the interview guide, these efforts to establish human rights indicators and indicators on VAW were combined with the obligations and recommendations that follow from the human rights framework as described in Chapter IV (section 7.3). With the interview guide, I aimed to be as comprehensive as possible, covering all actions to be taken by Senegal in relation to the elimination of FGM/C, but at the same time allowing new topics to emerge. The interview guide consisted of 11 themes and 36 questions and ensured a focused in-depth exploration of the compliance question.

#### *Theme I. Ratification of human rights treaties*

The first theme tapped respondents’ personal perspectives on the ratification behaviour of the Senegalese government. Since ratification is an expression by the State of its consent to be bound by a human rights treaty under international law, it is an indication of a government’s commitment to safeguarding human rights. Respondents were asked whether and why the Senegalese government has (not) ratified all “core” human rights treaties, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the African Charter on Human and Peoples’ Rights (ACHPR).

#### *Theme II. Cooperation with Treaty Monitoring Bodies*

The second theme assessed the respondents’ perspectives on the reporting behaviour of the Senegalese government to the Treaty Monitoring Bodies. Respondents were asked whether and why the Senegalese government does (not) respect its legal obligation to submit periodic reports to the respective Treaty Monitoring Body on how the human rights are being implemented.

<sup>23</sup> UN Women, *Supplement to the Handbook for Legislation on Violence Against Women: “Harmful Practices” Against Women*, New York, 2012, available at <http://www.unwomen.org/~media/headquarters/attachments/sections/library/publications/2012/12/unw-legislation-supplement-en%20pdf.pdf?v=1&d=20141013T121502> [Last Accessed 1 October 2015].

<sup>24</sup> United Nations Children’s Fund, *Legislative Reform to Support the Abandonment of Female Genital Mutilation/Cutting*, August 2010, p. 41-44.

<sup>25</sup> *Ibid.*, p. 41.

*Theme III. Criminalizing FGM/C*

The third theme explored why the national law against FGM/C was adopted in Senegal, whether the human rights framework had any influence on the adoption of the law, if the general population has knowledge about the existence of the law criminalizing FGM/C, if the law has a deterrent effect, if it is important to have a law against FGM/C, if the law is sufficiently implemented and enforced, if there are mechanisms in place to monitor adherence and implementation of the law and if the number of court cases is representative for the incidence of FGM/C in Senegal.

*Theme IV. Policies and National Action Plans*

The fourth theme investigated the policies developed at the government level (including National Action Plans (NAPs), strategies, rules and regulations) aimed at preventing and eliminating FGM/C. Respondents were asked which policies have been adopted, why these policies have been adopted, whether the human rights framework had in their opinion any influence on the adoption of these policies, if the policies are well implemented and if the policy documents have been successful.

*Theme V. Role of the government*

The fifth theme addressed the role of the government in relation to the elimination of FGM/C in Senegal. Respondents were asked what the role is of the government in relation to the elimination of FGM/C in Senegal, whether FGM/C is a priority for the Senegalese government, whether sufficient resources (including budgets) allocated towards the implementation of the legislative and policy frameworks and if there are any outreach activities to communities by government agencies.

*Theme VI. Role of CSOs*

The sixth theme addressed the role of CSOs in relation to the elimination of FGM/C in Senegal. Respondents were asked what they considered the role of CSOs in this field, but also how the role of CSOs in relation to the elimination of FGM/C relates to the work of the government. Respondents were also asked whether the government supports and recognizes the role that CSOs play in the elimination of FGM/C and whether CSOs are given all necessary support and encouragement.

*Theme VII. Role of the UNICEF-UNFPA Joint Programme*

The seventh theme addressed the role of UNICEF-UNFPA Joint Programme. In 2007, UNFPA and UNICEF launched the 'UNFPA-UNICEF Joint Programme on Female Genital Mutilation and Cutting: Accelerating Change.' This Joint Programme was established, as the main UN instrument to promote acceleration of the elimination of FGM/C. Senegal was one of the first countries where the Joint Programme was implemented. Respondents were asked what they considered the role of the Joint Programme in Senegal. Respondents were also asked how the role of the Joint Programme relates to the work of the government and the work of CSOs in the field.

*Theme VIII. Data collection and research*

The eighth theme covered data collection and research. Respondents were asked if basic data about the prevalence, trends, attitudes and behaviour regarding FGM/C, as well as on reported cases and enforcement of legislation are collected and disseminated. Respondents were also asked whether there is a need for more research on FGM/C.

*Theme IX. Support services*

The ninth theme included the availability of support services (medical, social, psychological) to assist and protect girls who have been subjected to FGM/C or those at risk of FGM/C. Respondents were asked whether, and if so which support services are available for these girls and women.

*Theme X. Training for students and professionals*

The tenth theme studied the training for students and professionals. Respondents were asked if awareness of FGM/C is integrated in the curricula of students and whether health professionals (doctors, nurses, midwives, psychologists) are trained to detect, manage and counsel FGM/C. In addition, respondents were asked if trainings on FGM/C are provided for the following other sectors: family services and child protection services, teachers and other school staff, legal professionals (judges, magistrates, lawyers), immigration officers and law enforcement professionals.

*Theme XI. Alternatives*

The last theme covered the availability of alternatives to FGM/C. Because FGM/C is not a rite of passage in Senegal, respondents were asked if alternative training and education programmes for cutters are available with the aim to adopt an alternative profession and an alternative source of income.

Each of the themes were explored in-depth through sets of questions, both open – allowing the emergence of information – and closed – probing for specific information. The interview was concluded by making specific inquiries about the impact of the human rights framework in relation to the elimination of FGM/C in Senegal. The interview guide used during this case study in Senegal can be found in Annex III.

*3.3.3 Identification and selection of respondents*

The aim of the case study in Senegal was to find an answer to the ‘compliance question,’ but not to find an answer to the question whether the human rights framework has made a difference in the lives and well being of individuals and groups at the community level in Senegal. The answer to the ‘compliance question’ lies primarily at the governmental level. For that reason, I decided to focus solely on the national level and not on the community level. As a consequence, practicing communities or victims of FGM/C were not considered interview respondents.

Three categories of respondents were identified: (i) representatives of the Senegalese government; (ii) representatives of CSOs; and (iii) representatives of international organizations (IO). The knowledge, experiences and opinions of



these three categories of respondents were considered relevant and necessary in order to be able to answer the research question to the case study in Senegal.

#### *Representatives of the Senegalese government*

In the first place, representatives of the Senegalese government were interviewed, because the Senegalese government is ultimately responsible for complying with the human rights framework, guaranteeing the rights described in the human rights instruments to the people in their jurisdiction. National governments are accountable for fulfilling its human rights obligations and must ensure compliance with human rights standards. The Inter-agency Statement on FGM/C explained: "The responsibility for action lies with many players, [...] but the accountability ultimately rests with the government of a country, to prevent female genital mutilation, to promote its abandonment, to respond to its consequences, and to hold those who perpetrate it criminally responsible for inflicting harm on girls and women."<sup>26</sup> The previous chapter showed that governments have legal obligations to respect, protect and promote human rights, and can be held accountable for failing to fulfil these obligations.<sup>27</sup> This entails taking necessary measures to eliminate FGM/C in Senegal. The purpose of investigating at the level of the State was to find out whether, and in what manner, the Senegalese government had taken any of such measures, actions or initiatives to address FGM/C in line with the obligations and recommendations following from the human rights framework. Several representatives of Ministries were selected as respondents, most importantly from the Department of the Family (*Direction de la Famille*) of the Ministry of Women, Family and Children (*Ministre de la Femme, de la Famille et de l'Enfance*) which is the main governmental agency mandated to take action in the field of FGM/C. Other relevant Ministries include the Ministry of Health, the Ministry of Justice and the Ministry of Education. In addition, National Human Rights Institutions (NHRI) and Parliamentarians were also interviewed. Parliamentarians play a critical in bringing the issue of FGM/C into policy debates<sup>28</sup> and NHRI are important in relation to the promotion and protection of human rights and deal with matters concerning the implementation of international and regional human rights law.

#### *Representatives of CSOs*

In the second place, representatives of CSOs were interviewed, because they are considered key actors in designing and implementing programmes for the elimination of FGM/C.<sup>29</sup> CSOs are often the translators of norms and rights, and therefore important actors to take into account when researching the 'compliance question'. Civil society comprises non-governmental organizations, including women's groups, men's groups, religious groups, independent experts/consultants and activists. Civil society has a critical role in providing

<sup>26</sup> World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008, p. 17.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid, p. 19.

<sup>29</sup> Ibid.

expertise and support and is one of the main actors involved in eliminating FGM/C in Senegal.<sup>30</sup>

#### *Representatives of international organizations*

In the third place, representatives of international organizations were interviewed, because they play an important role in supporting international and national initiatives by providing technical and financial support.<sup>31</sup> Representatives of UNICEF and UNFPA were interviewed, because of the existence of the 'UNFPA-UNICEF Joint Programme on Female Genital Mutilation and Cutting: Accelerating Change.' However, also the WHO, the Office of the High Commissioner for Human Rights (OHCHR) as well as UN Women were also identified as important actors in relation to the elimination of FGM/C in Senegal.

In order to avoid biases in relation to the selection of respondents (as much as possible), I carried out the fieldwork in Senegal on my own, without any formal cooperation agreement with for example Cheikh Anta Diop University (or any other research institute), Tostan (or any other CSO), UNICEF or UNFPA (or any other international organization). A helpful tool in identifying respondents within these three categories was to check annexes of relevant documents that have been written about FGM/C in Senegal, i.e. the evaluation of the first NAP,<sup>32</sup> the evaluation of the national law in Senegal criminalizing FGM/C<sup>33</sup> and the evaluation of the UNICEF-UNFPA Joint Programme on FGM/C in Senegal.<sup>34</sup> In the annexes of these evaluations, lists of stakeholders and/or experts in relation to FGM/C in Senegal who were consulted during the evaluations can be found. These lists of stakeholders and/or experts provided a valuable starting point for the identification of respondents. In addition, minutes of meetings organized at the Department of the Family (*Direction de la Famille*) of the Ministry of Women, Family and Children (*Ministère de la Femme, de la Famille et de l'Enfance*) were studied in order to further identify experts that work in the field of FGM/C in Senegal.

<sup>30</sup> United Nations Population Fund and United Nations Children's Fund, *Joint Evaluation of the UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change (2008-2012) – Senegal* (Original in French: *Évaluation Conjointe du Programme Conjoint UNFPA-UNICEF sur les Mutilations Génitales Féminines/Excision: Accélérer le Changement (2008-2012) – Sénégal*), New York, July 2013, p. 11.

<sup>31</sup> World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008, p. 19

<sup>32</sup> A. Diop-Diagne, *Evaluation of the National Plan of Action for the Abandonment of Female Genital Mutilation* (Original in French: *Évaluation du Plan d'Action National pour l'Abandon de la Pratique des Mutilations Génitales Féminines*), Ministry of the Family, National Solidarity and Female Entrepreneurship, September 2008, p. 53.

<sup>33</sup> B. Ndiaye, *State Application of the Law on Excision in Senegal* (Original in French: *L'Etat d'Application de la Loi sur l'Excision au Sénégal*), Ministry of Family and Women's Organizations, UNFPA and UNICEF, December 2010, p. 76-77.

<sup>34</sup> United Nations Population Fund and United Nations Children's Fund, *Joint Evaluation of the UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change (2008-2012) – Senegal* (Original in French: *Évaluation Conjointe du Programme Conjoint UNFPA-UNICEF sur les Mutilations Génitales Féminines/Excision: Accélérer le Changement (2008-2012) – Sénégal*), New York, July 2013, p. ii and p. 68-70.

After drawing a short-list of government departments and organizations, the next step was to identify which persons would be most interesting for my research to interview. Within the government departments, people who were responsible for the FGM/C agenda and/or had most expertise about FGM/C and human rights were selected.<sup>35</sup> Within the international organizations, the same selection criteria were applied. The respondents who were responsible for the FGM/C agenda or most knowledgeable about FGM/C within the organization were selected. The selection of CSOs was based on the criteria that the organization should work specifically in the field of FGM/C. Respondents within the CSOs were selected on the basis of their position and function within the organization. In the first place, individuals in executive positions of CSOs were targeted for their in-depth knowledge of the women's rights movement (and struggle) in Senegal. In the second place, individuals working for CSOs who are involved in advocacy, education, community mobilization and awareness-raising at the grassroots level were interviewed as well.

The snowball method was also used. Respondents were asked after the interview if s/he would know another expert working in the field of FGM/C in Senegal. If this person was not yet on my short-list, I checked whether this person would fit in my research design. During the last month of the field study period, I showed the respondents after the interview a list with names of persons I already interviewed. I asked the respondents whether – according to them – someone was missing on this list. This proved to be an important method to identify respondents, since the starting-point for the selection of respondents were the annexes of evaluations of the first NAP, the national law and the Joint Programme. Apparently, the same persons were consulted over and over again and an often-heard critique was that “always the same persons were asked to evaluate certain programmes.” In order to avoid this response bias, and to make sure that not only the ‘usual suspects’ were included in my research, I gave other experts and stakeholders (who do not appear on these lists) the opportunity to participate in my research and I included their experiences, views and knowledge.<sup>36</sup>

### 3.3.4 *Contacting respondents*

The first step to recruit the respondents was to contact them via e-mail. The respondents received an e-mail with an invitation to participate in my research. This invitation e-mail contained three attachments: (i) a document with information and a summary of my research project to inform the targeted respondents about the purpose and aim of the study; (ii) the interview guide; and (iii) a letter of consent. The e-mail and the documents attached were written in French. When respondents did not reply to the e-mail, they were contacted by phone. If they agreed to participate, a date, place and time were agreed upon for the interview to take place. I also inquired whether the respondents preferred to do the interview in English or in French (with a translator).

<sup>35</sup> I found out who had most expertise about FGM/C and human rights during my “internship” at the Department of the Family, see section 3.4 of this Chapter.

<sup>36</sup> This proved to be a good strategy, since the ‘usual suspects’ mentioned names and provided the contact details of other experts and stakeholders.

### 3.3.5 *Informed consent*

Before the interview took place, informed consent was obtained from all participants. Since none of the participants were illiterate, all respondents signed the form and received a copy. Participation to this study was completely voluntary. Respondents could refuse to participate, refuse to answer a question or withdraw from the interview at any time without the need to explain or justify their decision. All respondents were informed that the information given would be treated anonymously and remained confidential. Although the respondents agreed that their names and details regarding their professional positions could be found in an annex of this book, the information gathered during the field research was made anonymous to avoid any possibility of identification. The respondents were guaranteed that their names would not appear in any analysis. All respondents gave their consent for the interview to be recorded, although one interview was not recorded, since this interview took place at the U.S. Embassy in Dakar. It was not allowed to bring in any recording instrument. Directly after the interview, a detailed report of the interview was made and sent to the respondent for approval via e-mail. This respondent approved the interview report with some minor changes. The participants were informed that they could ask to stop the recording at any time. One respondent used this possibility and shared information when the recorder was turned off for a couple of minutes. The respondents were also informed that the interviews were going to be transcribed. Three respondents inquired if they could review and approve the transcript of their interview. In these three cases, the transcripts were sent to these respondents via e-mail for approval. Without any modifications, these three respondents approved the transcripts. The letter of consent used during this case study in Senegal can be found in Annex IV.

### 3.3.6 *Interview procedure*

I conducted all interviews myself, face-to-face in order to be able to observe non-verbal behaviour and verbal tones of the respondent. Notes were made during the interview. All interviews comprised of individual discussions (no group conversations or 'focus groups' with two or more respondents were organized).

Before the interview started, I made sure that the respondent was sufficiently informed about the content and purpose of my study. I asked whether they had read the documents attached to the e-mail and if this was not the case, I briefly explained the rationale of my study. All interviews started with an introduction where the respondent was asked to introduce him/herself and to elaborate on his/her position and his/her main tasks and duties. This allowed me to assess whether the expertise of the respondent was in accordance with my expectations. Then, five or six themes of the interview guide were discussed. At the end of each interview, I asked the respondent whether there was anything that s/he wanted to share that had not come up during the interview.

### 3.3.7 Critical reflection on my own role

Qualitative research is sometimes viewed as unreliable because it reflects the normative predispositions of the researcher.<sup>37</sup> Being a foreigner, more precisely a young woman from the Netherlands with a white skin, blond hair and blue eyes, or in Ahmadu's terms an "outsider"<sup>38</sup> (individuals who are not from the societies they analyze and who have no personal experience of any form of the practice), might have positively and/or negatively influenced this research. I had a sincere wish to gain a deeper understanding of the 'compliance question' in relation to the practice of FGM/C and I tried my best not to be biased. I conducted the fieldwork in Senegal with an open mindset, being very much aware of the importance of non-judgmental language and approaching people in a very respectful manner, eager to learn more and deepen my knowledge about the practice. Although I was aware of any possible bias while conducting this study, I always tried to be as careful, transparent and neutral as possible when carrying out this research. As described in the section above, I have tried to control researcher bias by using the method of 'triangulation'. In addition, the conference organized at the end of the field study in Senegal, where I presented preliminary findings and received feedback, also helped to avoid researcher bias.

## 3.4 Pilot study

A two-week pilot study in Dakar was conducted in May 2013. As suggested by an African proverb from the Ashanti people in Ghana "*No one tests the depth of a river with both feet*", the main goal of my pilot study was to assess the feasibility of my empirical study so as to avoid consequences that could potentially "drown" my research project.<sup>39</sup> The preliminary field research set the stage for the exploration of Senegalese civil society work and the work of international organizations. I made most of my contacts with relevant Civil Society Organizations (such as Tostan, COSEPRAT, ASBEF and Save the Children) and international organizations (UNFPA, UNICEF, OHCHR) during the pilot study.<sup>40</sup>

During the desk research, I found out that the Senegalese government has mandated the Department of the Family (*Direction de la Famille*) of the Ministry of Women, Family and Children (*Ministre de la Femme, de la Famille et de l'Enfance*)<sup>41</sup> in Dakar to be the coordinating body to take action in the field of

<sup>37</sup> G. Shaffer and T. Ginsburg, Empirical Turn in International Legal Scholarship, *American Journal of International Law*, Volume 106, No. 1, 2012, p. 3.

<sup>38</sup> F. Ahmadu, *Rites and Wrongs: An Insider/Outsider Reflects on Power and Excision*, in: B. Shell-Duncan and Y. Hernlund, *Female "Circumcision" in Africa: Culture, Controversy and Change*, Lynne Rienner Publishers, 2000, p. 283.

<sup>39</sup> L. Thabane et al., A Tutorial on Pilot Studies: The What, Why and How, *BMC Medical Research Methodology*, Volume 10, No. 1, 2010, p. 1.

<sup>40</sup> For all CSOs included in this research, see Annex II.

<sup>41</sup> This Ministry changed its name several times in recent years. At the time of the adoption of the National Plan of Action for the Abandonment of FGM/C (2000-2005), the Ministry was referred to as the Ministry of the Family, National Solidarity and Female Entrepreneurship (*Ministère de la Famille, de la Solidarité Nationale de L'Entreprenariat Féminin*). Afterwards, it became the Ministry of Family, National Solidarity, Food Security, Female Entrepreneurship, Micro Finance and Early

FGM/C. During the pilot study, I “interned” at this Department of the Family, that allowed me to gain insights in the day-to-day practice and the way the FGM/C agenda was put forth at the governmental level. I shared the office with the civil servant who was responsible for the FGM/C agenda, which allowed me to get a first impression of the involvement of the Ministry of Women, Family and Children and the collaboration between different actors in relation to the actions taken to eliminate FGM/C in Senegal. During this “internship” I made detailed notes of my observations.

During the pilot study, the interview guide was tested through five pilot interviews with respondents. In this pilot phase, the study design was iterative, since data collection strategy and research questions in the interview guide were adjusted according to what was learned. Piloting the interview guide helped to eliminate leading questions. During the pilot study, the interview guide was discussed with two local Senegalese researchers (one with a legal and one with an anthropological background) who can be considered experts in relation to the practice of FGM/C in Senegal. They identified possible weaknesses and ambiguities in the interview guide. These two researchers also adjusted the language and terminology of the interview guide in order to be more suitable for the targeted respondents.

An important finding during the pilot study was that the interview guide was too long. Taking into account the considerable amount of themes and questions, it proved to be impossible to address all themes during one interview (of approximately one hour). The pilot interviews demonstrated that 5 or 6 themes on average per interview were feasible. Since the aim of the case study was to provide a complete picture of the ‘compliance question’, a solution for this problem was not to delete certain themes and to limit the interview guide in length. Instead, I decided to keep all eleven themes, but to select specific themes per respondent instead. During the course of the fieldwork, this proved to be a fruitful decision, since there was no single respondent who had sound knowledge about all eleven themes. Depending on the background, expertise and knowledge of the respondent, I therefore decided which themes I wanted to discuss with a specific respondent during the interview. I made these decisions in a structured way (see table 5.1 below for a complete overview of the themes discussed per respondent). For example: parliamentarians, civil servants, government consultants were mostly asked questions about the adoption of the law against FGM/C and policy development, while doctors, nurses, gynaecologists, sexologists, counsellors, social workers were mostly asked questions about support services and trainings for professionals. As table 5.2 shows, I also made sure that all eleven themes were covered by at least all three different groups (government, international organizations and civil society organizations).

During the pilot study, I also gathered relevant documents (such as NAPs, other policy documents, reports and evaluations of the government, CSOs and

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Childhood (*Ministère de la Famille, de la Solidarité Nationale, de la Sécurité Alimentaire, de l'Entreprenariat Féminin, de la Micro Finance et de la Petite Enfance*) and it was renamed the Ministry of Women, Children and Women Entrepreneurship (*Ministère de la Femme, de l'Enfant et de l'Entreprenariat Feminine*) in 2012.

international organizations) that I could not access in the Netherlands because they were not available online. I asked all organizations I visited if they had any reports, documents or information of other kind concerning FGM/C in Senegal (National Action Plans, policy documents, leaflets, folders, programmes, minutes of meetings, etc.) that could be useful for my study. These documents enabled me to deepen my knowledge about the action taken at the national level in relation to FGM/C. This was important for the preparation of the actual field study that followed a few months later.

### 3.5 Field research

During a period of 4.5 months (September 2013 until February 2014) the field research was conducted in Senegal. In total, 60 respondents were invited to participate in my research. The majority of the interviews took place in Dakar,<sup>42</sup> with a few exceptions: four interviews took place in Thiès and one interview in Guediawaye. Most of the interviews were conducted at the location of the respective department or organization where the respondent worked, but a number of interviews took place at the home of the respondent, in a restaurant, café or in the lobby of a hotel. The interviews took on average one hour. All 60 respondents reacted positively and agreed to participate in the research. In the end, 54 interviews were conducted. Due to busy time schedules, holidays and work missions outside Senegal of the remaining 6 respondents, it was not possible to schedule a meeting with them. More specifically, 12 interviews were conducted at the government level, 12 interviews with international organizations (IO) and 30 interviews with CSO. In total 32 women and 22 men were interviewed; 49 had the Senegalese nationality, 5 were non-Senegalese.

Table 5.1. Details of respondents

	Number of interviews	Male	Female	Senegalese	Non- Senegalese
Government	12	5	7	12	0
IO	12	5	7	9	3
SCO	30	12	18	28	2
Total	54	22	32	49	5

In total, 21 interviews were conducted in English, 33 interviews were conducted in French with a translator. In total, three different translators were involved in this study (two females and one male). All three were professional translators

<sup>42</sup> Although all interviews were conducted in the capital city of Senegal, I have visited practicing communities in remote areas in Saint-Louis, Louga, Diourbel, Thiès, Fatick, Kaolack, Sédhiou and Kolda (upon invitation of some CSOs and/or UNICEF).

and had a lot of experience in translating. One of the translators had extensive knowledge about FGM/C in Senegal. All three translators were Senegalese nationals and had knowledge of the culture of the people under study. Although the translators were carefully selected, it could be that the presence of this person in the room during the interview influenced the answers given to the questions posed. For example, it is possible that government officials gave politically correct and/or social desirable answers to certain questions, because another Senegalese national was present.

Respondents had a wide variety of backgrounds: executive directors, heads of units, legal officers, politicians, policy officers, human rights officers, programme coordinators, lawyers, project managers, activists, consultants, child protection officers/specialists, gender advisors, civil servants, government consultants, researchers, university professors, psychologists, sociologists, legal scholars, doctors, nurses, gynaecologists, sexologists, counsellors, social workers, imams, journalists, parliamentarians. For a complete overview of the persons interviewed and the respective organizations they work for, see Annex II.

All respondents had the opportunity to reflect on the preliminary research results during a conference that was organized at the end of the field study in January 2014 at the Residence of the Netherlands Embassy in Dakar. All respondents were invited and approximately 90% of them were present. During this conference, the preliminary findings of the fieldwork were presented. After the presentation, a Q&A session followed where the respondents were given the opportunity to give responses and provide feedback on the preliminary research results. The feedback of the respondents was very positive and useful. The conference proved to be a good way to validate the preliminary research results.

### 3.6 Data Analysis

As described in section 3.3.5, interviews were audio-recorded. All interview recordings were transcribed *verbatim*<sup>43</sup> in Word documents, with the help of research assistants, using the software programme F5. The transcripts were later anonymised. The three different categories (Government, IO and CSO) were kept. In addition to the transcripts, my notes made during the interviews, my notes made during the “internship” at the Department of the Family as well as my notes made at the conference at the Residence of the Netherlands Embassy in Dakar were taken into account as well.

The aim of this study was not to quantify the results of the in-depth interviews, but to look at how and why respondents differ in views in order to discover patterns, factors and new ideas. The data analysis consisted of a thematic analysis, which was carried out manually. In a systematic way, all transcripts were coded in terms of the predetermined eleven themes of the interview guide. Although my aim was not to quantify the results (for example

<sup>43</sup> ‘Verbatim’ means that there is no editing involved and everything is typed out just as it is on the recording: “word for word.”



to state that “six out of ten respondents said...”), I was nevertheless interested in how many respondents gave a specific answer to a specific question. Therefore, I made eleven excel sheets for each theme and I identified the different answers given to the questions. I counted how many times a specific answer was given, in order to assess whether the answer was given by the following category: “all respondents”, “many respondents”, “some respondents” or “none of the respondents” and I differentiated in the three groups of respondents. In this way, I was able to identify how many respondents gave which answer to a specific question, but also whether one group gave a specific answer, while another group did not. Table 5.2 provides an overview of the themes discussed with how many respondents (differentiated per category).

**Table 5.2 Themes discussed with respondents**

	I	II	III	IV	V	VI	VII	VIII	IX	X	XI
Government	10	10	11	6	5	3	3	7	2	1	5
IO	12	12	11	9	2	3	4	9	2	3	4
SCO	18	18	29	17	9	6	8	16	9	4	8
Total	40	40	51	32	16	12	15	32	13	8	17

In order to increase the credibility and validity of the research results, the method ‘triangulation’ was used, which enabled me to “compare different kinds of data from different sources to see whether they corroborate each other.”<sup>44</sup> Multiple data collection methods were used in this case study; not only semi-structured interviews, but also desk research (section 3.2). The data following from the analysis with the interviews was compared with the data collected during the extensive a priori desk study of the existing literature and documents concerning FGM/C in Senegal, in order to see whether there were any differences. This mixed study design approach proved to be a successful method to avoid and control researcher bias. It enabled me to provide a more detailed and balanced picture and enhanced the rigour of this field research.<sup>45</sup>

### 3.7 Limitations and constraints

#### 3.7.1 Sensitive subject

Since FGM/C is a very sensitive issue, it leaves room to question the truthfulness of a respondent when questioned by an unknown interviewer. The likelihood for respondents to give culturally acceptable answers constitutes a concern.

<sup>44</sup> C. Seale, *Researching Society and Culture*, Sage Publications Ltd, 2000, p. 231.

<sup>45</sup> H. Altrichter et al., *Teachers Investigate their Work; An Introduction to Action Research across the Professions*, Routledge, 2008, p. 147.

### 3.7.2 Isolating FGM/C from its context

While I am fully aware that the practice of FGM/C cannot be isolated from its context (and acknowledging that the main problem of the current campaign against FGM/C is the tendency to do that), taking into account the limited time and resources for this research, the decision has been made to focus only upon the practice of FGM/C. While I tried to address in the analysis, other problems many Senegalese women face (for example inequality in relation to marital authority, parental authority, choice of residence, property, divorce, levirate and sororate)<sup>46</sup> and women's dependence on male family members, it proved not to be possible in this thesis to fully address the debilitating conditions, which constitute the reality of many Senegalese women.

## 4 THE REPUBLIC SENEGAL

### 4.1 Geographic, Demographic and Economic Characteristics<sup>47</sup>

The Republic of Senegal is located in the extreme west of the African continent along the Atlantic Ocean with 700 km of coastline. Covering a land area of approximately 197,000 square kilometres, Senegal is bounded to the north by Mauritania, to the east by Mali and to the south by Guinea and Guinea-Bissau. Internally, Senegal almost completely surrounds the Gambia, namely on the north, east and south, except for Gambia's short Atlantic coastline (see Annex I for a map of Senegal).

Dakar, the capital city of Senegal, is located at the westernmost tip of the country. Senegal is divided into 14 administrative regions: Dakar, Diourbel, Fatick, Kafrine, Kaolack, Kédougou, Kolda, Louga, Matam, Saint-Louis, Sédhiou, Tambacounda, Thiès and Ziguinchor. Regional capitals have the same name as their respective regions. The autonomy of local governments is strengthened by Act No. 96-06 of 22 March 1996 by transferring major areas of responsibility to the regions. Each regional government is now administered by a governor and regional councillors, which are both elective posts.<sup>48</sup> The 14 administrative regions are subdivided into 45 departments, 165 municipalities, 123 arrondissements and 383 rural administrative areas. Elected mayors and municipal councillors administer the municipalities. A chief councillor and rural councillors, all of whom are elected at the local level, govern the rural administrative areas.<sup>49</sup>

Senegal has a large amount of demographic and economic data through surveys conducted over the past thirty years. These various investigations have yielded basic demographic and economic data and trends. Senegal's population is growing rapidly and almost doubled between 1988 and 2012: from 6,9 to 13,2

<sup>46</sup> Traditional practices where a man may marry his dead brother's widow or his dead wife's sister.

<sup>47</sup> Unless otherwise cited, the information in this paragraph is cited from the most recent DHS survey: Agence Nationale de la Statistique et de la Démographie [Sénégal], et ICF International, *Enquête Démographique et de Santé Continue (EDS-Continue 2012-2013)*, ANSD et ICF International, 2012, p.1-2.

<sup>48</sup> United Nations Committee Against Torture, *Third Periodic Report of Senegal*, CAT/C/SEN/3, 5 October 2011, p. 4, para. 9.

<sup>49</sup> Ibid, p. 4, para. 9.

million inhabitants (including 6,5 million men and 6,7 million women). In 2014, Senegal had 14,55 million inhabitants.<sup>50</sup> The under-representation of men compared to women can be explained largely by emigration, which affects more men. The strong growth results in an extreme young population: more than 50% of the Senegalese population is younger than 20 years (45% are under 15 years and only 5% over 65 years). Over the past 25 years, the fertility of women in Senegal has declined from 6.4 children per woman in 1986 to 5.3 children in 2013. Some differences in fertility appear between areas of residence: urban women have a significantly lower level of fertility (4.1 children per woman) than rural women (6.3 children per woman). Senegalese households are large: a household consist of an average of 9.3 members. Rural households are larger than those in urban areas (respectively 10.1 and 8.5 people on average).<sup>51</sup> In 75% of the cases, the head of the household is a man; women head one-quarter of households. Almost half (45%) of household members are children under age 15.<sup>52</sup> Infant and child mortality remains high in Senegal, although childhood mortality levels have been decreasing over the past years. On 1000 infants born alive, 47 infants die before reaching their first birthday (26% in the first month and 17% between month 1-12). Among infants over one year, 23% did not reach their fifth birthday. Overall, the risk of dying between birth and the fifth birthday is 65 per 1000 births, or about one in 15.

The average population density is 68 inhabitants per square kilometre. However, the population is unevenly distributed among the 14 administrative regions. For example, Dakar is home to nearly 20.5% of the total population with 2,7 million people. In the regions Thiès and Diourbel live respectively 1,7 million and 1,4 million inhabitants. Conversely, the eastern regions of the country are sparsely populated. The Kédougou region has the lowest population size with 137,485 inhabitants (only 1.0 % of the total population) and the largest region, Tambacounda, houses approximately 6 % of the population. The illiteracy rate at the national level is 65%. The illiteracy rate varies from one region to another: the lowest was observed in Dakar (35%); Ziguinchor follows with 43%. In other areas, outside of St. Louis and Thiès, illiteracy is over 75%. The results of the 2010-11 DHS-MICS<sup>53</sup> show that the education level of the Senegalese population is low, especially among women. Overall, 57% of Senegalese women aged 15-49 have no formal education, compared to 48% of men in the same age-category. By contrast, only 3.1% of the women and 3.2% of men have completed primary education (while 26.1% of women and 27.5% of men did not complete the cycle). Only 2% of the Senegalese women reported having completed secondary education or higher (while 11.4% of women and

<sup>50</sup> See the website of the World Bank, *Data Senegal*, available at <http://data.worldbank.org/country/senegal> [Last accessed 1 October 2015].

<sup>51</sup> Agence Nationale de la Statistique et de la Démographie [Sénégal], et ICF International. *Enquête Démographique et de Santé à Indicateurs Multiples au Sénégal (EDS-MICS) 2010-2011*, ANSD et ICF International, 2012, p. 23-24.

<sup>52</sup> Agence Nationale de la Statistique and ICF International, *2010-11 Senegal Demographic and Health and Multiple Indicators Survey: Key Findings*, ANSD and ICF International, 2012, p. 2.

<sup>53</sup> Agence Nationale de la Statistique et de la Démographie [Sénégal], et ICF International. *Enquête Démographique et de Santé à Indicateurs Multiples au Sénégal (EDS-MICS) 2010-2011*, ANSD et ICF International, 2012, p. 24-26.

15.4% of men did not complete the cycle), compared to 4.1% of men. Examination of the results by age shows a significant improvement in the level of education from older to newer generations. The proportion of men with no education increased from 80.5% among those aged 65 and over to 33.2% of those aged 10-14. Among women, the progress has been more rapid in recent years. The proportion of those uneducated pass 94.4% among those aged 65 and over and 30.7% of those aged 10-14. However, only 51% of school-aged children (6-11 years) are enrolled in primary school. Girls attend primary school a little more than boys: 50.4% of boys and 51.8% of girls are enrolled (gender parity index is 1.03). The school attendance rate is influenced by the place of residence of the children (66% in urban areas and 43% in rural areas) and the level of economic well being of the household (39% of children of households in the lowest quintile and 70% for households in the highest quintile). At secondary level, the enrolment rate of school-aged children of (12-16) years is much lower compared to the primary level, namely 24.5%. Boys attend secondary school a little more than girls: 24.6% boys and 24.4% girls are enrolled (gender parity index is 0.99). The proportion of children enrolled at the secondary level is much higher in urban areas (36%) compared to rural areas (17%).

The 2010-11 DHS-MICS<sup>54</sup> results show disparities in men and women's employment; 49% of married women aged 15-49 have work, compared to 98.8% of married men aged 15-49. Moreover, this proportion increases with the age (from 27.4% among young women aged 15-19 to 68.6% among those aged 45-49). Among the women who worked, 79% were paid in cash (compared to 77% of men). Among women who received cash payment for their work, 8 in 10 earned less than their husbands or partners. In total 12% of married women and 11.1% of married men were not paid for their work.

As in most West African countries, Senegal has a wide variety of ethnic groups. Although Senegal has more than 20 ethnic groups, more than 90% of the population belongs to one of the five dominant ethnic groups. Wolof is the largest single ethnic group in Senegal (43%), followed by Poular (24%) and Sérér (15%). Other groups are located in the southern areas of the country, particularly in the region of the Casamance. They include the Diola (5%), and the smaller communities of the Mandingue (4%), which are located in outlying regions close to Mali or Guinea.<sup>55</sup>

Senegal's population is predominantly Muslim (94%). The Christian population (4%) includes mostly Roman Catholics, but also diverse Protestant denominations. Animist and other indigenous beliefs (Traditional African religion – for example the Serer religion) account for the remaining 2%. French is the official language of Senegal,<sup>56</sup> but is used regularly only by the literate minority. The national languages are Wolof, Diola, Malinké, Pular, Sérère and Soninké, of which Wolof has the largest usage. Life expectancy at birth in

<sup>54</sup> Agence Nationale de la Statistique et de la Démographie [Sénégal], et ICF International. *Enquête Démographique et de Santé à Indicateurs Multiples au Sénégal (EDS-MICS) 2010-2011*, ANSD et ICF International, 2012, p. 275-277.

<sup>55</sup> United Nations Committee Against Torture, *Third Periodic Report of Senegal*, CAT/C/SEN/3, 5 October 2011, para. 6.

<sup>56</sup> Constitution of the Republic of Senegal, 2010, As Amended to Constitutional Law No. 2009-22 of 19 June 2009, Article 1.

Senegal increased from 60 years in 2004 to 62 years in 2007 and 63 years in 2012.<sup>57</sup>

Since Senegal has limited natural resources, the economy of Senegal gains most of its foreign exchange from fish, phosphates, groundnuts, tourism and services. Thanks to the launch of a structural economic reform program in 1994 (backed by the donor community), Senegal made significant progress, which led to real growth in the Gross Domestic Product (GDP) averaging over 5% annually during 1995-2007. From the year 2000 on, the main engines of growth were construction, commerce, transport and telecommunications. The effects of the global financial crisis from 2008 to 2009 have slowed this positive trend. Since 2010, Senegal's economy began to recover under the double effect of the recovery of the world economy and the measures taken by the authorities in favour of national economic activity. Indeed, the growth rate of GDP increased from 2.2% in 2009 to 4.2% in 2010 and decreased to 2.8% in 2013. The GDP was \$14,79 billion in 2014.

While the 1994 programme succeeded in improving public finances and increasing the currency's stability, it did not result in a significant reduction in poverty or unemployment (which stands between 40-50% and is particularly high among young people).<sup>58</sup> In 2011, 46.7% of the population was living below the poverty line. In 2006 this was 48.3% and in 2001 it was 55.2%. Poverty is lower in Dakar (26%) than in other urban areas (41%) and rural areas (57%). Although the incidence of poverty declined slightly, it was accompanied by an absolute increase in the number of poor over the period (from 5.7 million in 2006 to 6.3 million in 2011). The outstanding domestic as well as the external public debt increased remarkably over the past years. The total outstanding external debt reached 39.7% of GDP, against 26.0% in 2008.

## 4.2 Constitutional, Political and Legal Structure<sup>59</sup>

After Senegal gained its independence from France in 1960, the country had a single-party system (the Senegalese Progressive Union, which became in 1976 the Socialist Party of Senegal) under the leadership of the first president Léopold Sédar Senghor. The Constitution of the Republic of Senegal was adopted in 1963.<sup>60</sup> With establishment of democratic institutions and a multiparty system between 1970 and 1980, Senegal has long been cited as an example to follow in a continent where authoritarian regimes predominate. President Léopold Sédar Senghor voluntarily relinquished power in 1980. The Senegalese Constitution was amended in 1981 to formally allow for multiparty system. In 1981, Abdou Diouf became the new President of the Republic. Abdou Diouf served four terms as President between 1981 and 2000. For 40

<sup>57</sup> See the website of the World Bank, *Data Senegal*, available at <http://data.worldbank.org/country/senegal> [Last accessed 1 October 2015].

<sup>58</sup> United Nations Committee Against Torture, *Third Periodic Report of Senegal*, CAT/C/SEN/3, 5 October 2011, p. 4, para. 10.

<sup>59</sup> Unless otherwise cited, the information in this paragraph is cited from the third periodic report of Senegal to the Committee Against Torture: United Nations Committee Against Torture, *Third Periodic Report of Senegal*, CAT/C/SEN/3, 5 October 2011, p. 7, para. 22-28.

<sup>60</sup> Constitutional Law 63-22 of 7 March 1963.

years, Senegal's principal political party was the Socialist Party of Senegal. This domination came to an end in 2000, when Senegal experienced its second peaceful transition of power, and its first from one political party to another. Abdoulaye Wade, who was an opponent of the Socialists and the leader of the Senegalese Democratic Party, won the presidency. This transition stands as an example of one of the rare cases of a peaceful transfer of power in Africa. In a referendum held in January 2001, Senegalese voters (with a turnout of over 90 per cent) approved the new Constitution presented by President Abdoulaye Wade. He was re-elected in 2007 and served till April 2012, when Macky Sall (member of the political party Alliance for the Republic) became the new President. Senegal is one of the few African states that have never experienced a coup d'état and it remains one of the most stable democracies in Africa. The president and the executive branch hold executive power. The Head of State is elected by direct universal suffrage (by majority vote in two rounds) for a renewable five-year term. The 2001 constitution introduced a two-term limit for the president. The prime minister is the Head of Government and appointed by the President. The prime minister nominates the cabinet ministers. The Government directs and coordinates the nation's policies. The constitutional amendments of 2007 and 2008 led to the reinstatement of the Senate (100 seats), which, together with the National Assembly (150 seats), now makes up the country's bicameral legislature. The judiciary is (theoretically) independent of the executive and legislative branches. The country's justice system is patterned after the French system and includes the Constitutional Council, the Supreme Court and a number of lower courts, members of which are named by the president.

## 5 FGM/C IN SENEGAL

Demographic and Health Surveys (DHS) and Multiple Indicator Cluster Surveys (MICS) provide extensive data on prevalence and nature of FGM/C. Data regarding FGM/C was for the first time<sup>61</sup> collected in Senegal in 2005,<sup>62</sup> subsequently in 2010-2011,<sup>63</sup> again in 2012-2013<sup>64</sup> and the most recent statistics date from 2014.<sup>65</sup> This section provides an overview of the available data in relation to FGM/C in Senegal.

<sup>61</sup> Although the DHS and MICS were conducted in Senegal in 1986, 1992 and 1997, questions about FGM/C were not included.

<sup>62</sup> S. Ndiaye and M. Ayad, *Enquête Démographique et de Santé au Sénégal 2005*, Centre de Recherche pour le Développement Humain [Sénégal] et ORC Macro, 2006, p. 237-258.

<sup>63</sup> Agence Nationale de la Statistique et de la Démographie [Sénégal], et ICF International. *Enquête Démographique et de Santé à Indicateurs Multiples au Sénégal (EDS-MICS) 2010-2011*, ANSD et ICF International, 2012, p. 293-302.

<sup>64</sup> The DHS-Continue 2012-2013 only collected data on FGM/C prevalence among young girls aged 0-15 years, see Agence Nationale de la Statistique et de la Démographie [Sénégal], et ICF International, *Enquête Démographique et de Santé Continue (EDS-Continue 2012-2013)*, ANSD et ICF International, 2012, p. 85-88.

<sup>65</sup> Agence Nationale de la Statistique et de la Démographie [Sénégal], et ICF International, *Sénégal: Enquête Démographique et de Santé Continue (EDS-Continue 2014)*, ANSD et ICF International, 2015, p. 95-104.

## 5.1 Knowledge about FGM/C

According to the DHS-2014, the proportion of Senegalese women who reported knowledge about FGM/C is high: 92.1% of the women<sup>66</sup> and 88.5% of the men<sup>67</sup> surveyed indicated that they know the practice. There are slight variations in knowledge about the practice, depending on the socio-demographic characteristics (such as age, religion, residence, ethnicity, region, level of education and economic well-being). For example, 96.3% of the women and 99.3% of the men in the age group 45-49 reported knowledge about FGM/C, while 84.4% of women and 67.6% of the men in the age group 15-19 know about the practice. While 91.9% of the Muslim women and 88.3% of the Muslim men reported knowledge about FGM/C, 96.6% of the Christian women and 92.3% of the Christian men knew about the practice. There are also slight differences in place of residence: 96.1% of the women and 93.2% of the men from urban areas know about the practice, while 87.4% of the women and 82.4% of the men living in rural areas reported knowledge about FGM/C.

## 5.2 National prevalence

According to the DHS-2014, 24.7% of the girls and women aged between 15 and 49 have been subjected to FGM/C in Senegal. In 2005, the national prevalence was 28.2% and in 2010-2011, the national prevalence was 25.7%. Thus, between 2005 and 2014, the prevalence of FGM/C among girls and women aged 15-49 in Senegal dropped with 3.5%. A comparison of prevalence rates across age groups indicates a slight decline in prevalence of FGM/C between generations, see table 5.3.

Table 5.3 National prevalence of FGM/C

FGM/C Prevalence	2005	2010-2011	2014
National prevalence	28.2%	25.7%	24.7%
Age group 15-19	24.8%	24.0%	21.1%
Age group 45-49	30.6%	28.5%	25.7%

There are significant differences in prevalence rates in Senegal depending on the region and ethnicity.

## 5.3 Regional differences

In Senegal, FGM/C is not practiced consistently across the country and there are major differences between regions. Although the DHS-2014 differentiates only between the North (30.4%), West (16.6%), Central (6.3%) and South (69.4%);

<sup>66</sup> In 2005 this proportion was 94% and in 2010-2011 this was 91.3%.

<sup>67</sup> In 2005 this proportion was 92.4% and in 2010-2011 this was not included in the survey.

the DHS-2010-2011 provides more detailed information about the prevalence per region. In Kédougou (92.0%), Matam (87.2%), Sédhiou (86.3%), Tambacounda (85.3%) and Kolda (84.8%) the practice is widespread, while in the regions of Diourbel (0.5%), Thiès (3.5%), Louga (3.8%), Kaolack (5.6%) and Fatick (7.3%), the prevalence is low. Differences in prevalence also exist between urban (21.9%) and rural areas (27.9%). Table 5.4 also provides an overview of the statistics of 2005 and 2010-2011.

**Table 5.4 Differences between urban and rural areas**

Area	2005	2010-2011	2014
Urban	21.7%	23.4%	21.9%
Rural	34.4%	27.8%	27.9%

The prevalence in the Dakar region increased: the amount of women in the Dakar region who underwent FGM/C rose with 2.8% (from 17.3% in 2005 to 20.1% in 2010).<sup>68</sup>

#### 5.4 Ethnic differences

The prevalence of FGM/C in Senegal is strongly influenced by ethnicity. There are significant differences among the different ethnic groups. FGM/C is commonly practiced among the Mandingue, the Poular, the Diola, and the Soninké ethnic groups. FGM/C is much less commonly found among other ethnic groups such as the Wolof and the Serer, see table 5.5.

**Table 5.5 Ethnic differences**

Ethnic group	2005	2010-2011	2014
Mandingue	73.7%	81.9%	64.4%
Poular	62.1%	54.5%	51.8%
Diola	59.7%	51.5%	46.2%
Soninké	78.2%	64.9%	42.9%
Serer	1.8%	2.2%	2.4%
Wolof	1.6%	0.9%	1.3%

<sup>68</sup> It is not possible to provide statistics about the prevalence in the Dakar region of 2014, since the DHS-2014 only differentiates between the north (30.4%), west (16.6%), central (6.3%) and south (69.4%).



## 5.5 Type of FGM/C

During the investigations for the DHS and MICS, it proved to be difficult to obtain reliable data on the type of FGM/C performed. The typology of the WHO<sup>69</sup> was to a certain extent left aside, and instead, during the survey the women were asked specific questions to identify the type of FGM/C performed on them. The women were asked if they had undergone a simple cut or whether parts in the area of genitals had been removed. This question was posed to differentiate between a “symbolic” form or “simple” cut and the total or partial removal of the external female genitalia. In addition, attempting to identify women who have undergone the most extreme form of FGM/C (infibulation), women were asked whether the genital area was sewn closed during the procedure. The answers to these questions were divided into three categories, being (I) a cut without the removal of any tissue (*entaille, pas de chair enlevée*), (II) removal of tissue in the genital area (*parties de chair enlevées*) and (III) closure of the vagina (*fermeture du vagin*).

According to the data of the DHS-2005 and the DHS-MICS 2010-2011, the majority of Senegalese women (respectively 82.7% and 52.7%) had undergone type II. However, according to the most recent data of the DHS-2014, the majority of Senegalese women (50.5%) had undergone type I. This might indicate a trend towards less severe cutting in Senegal, see table 5.6 below. A high percentage of women (23.2%) were not able to give an answer or a specific response, probably because they were too young at the time of the procedure.<sup>70</sup>

Table 5.6 Type of FGM/C

Type of FGM/C	2005	2010-2011	2014
I	0.2%	9.9%	50.5%
II	82.7%	52.7%	14.2%
III	11.9%	13.8%	12.1%

## 5.6 Person performing FGM/C

According to the DHS-2005, the practice of FGM/C is still very traditional in Senegal. A traditional practitioner performed FGM/C on almost all women (90.8%), regardless of the type of FGM/C performed. In 1.5% of the cases, *matrones* (traditional midwives or birth attendants) have conducted the procedure and in 0.3% of the cases FGM/C other traditional persons have

<sup>69</sup> For more information about the different types of FGM/C performed and the classification of the WHO, see Chapter III, section 3 of this research.

<sup>70</sup> Agence Nationale de la Statistique et de la Démographie [Sénégal], et ICF International, *Sénégal: Enquête Démographique et de Santé Continue (EDS-Continue 2014)*, ANSD et ICF International, 2015, p. 97.

performed it. The DHS-2005 also indicated that health care professionals (doctors, nurses, midwives) performed FGM/C in 0.6% of the cases. In 6.9% of the cases, women were unable to respond.

According to the DHS 2010-2011, FGM/C is performed by a traditional practitioner in 91.4% of the cases, in 1.0% of the cases by *matrones*. In the remaining 7.6% of the cases, other traditional persons have done the procedure. However, the DHS-MICS 2010-2011 does not report cases performed by health care professions, despite the increasing rumours of medicalization of the practice in Senegal. Unfortunately, the DHS-2014 did not include any data about the persons performing FGM/C. Table 5.7 summarizes the information above.

**Table 5.7 Persons performing FGM/C**

Person	2005	2010-2011	2014
Traditional practitioner	90.8%	91.4%	N/A
Traditional midwife	1.5%	1.0%	N/A
Other traditional person	0.3%	7.6%	N/A
Health care professional	0.6%	N/A	N/A

### 5.7 Age at FGM/C

FGM/C in Senegal is practiced at very young ages. The statistics of the DHS-2014 show that 64.2% of the women underwent FGM/C before the age of 5 years. In addition, 15.4% of the women have undergone the procedure between 5 and 9 years and 8.8% between 10 and 14 years. In less than one percent (0.6%) of the cases, the women was 15 years old or above. Table 5.8 provides an overview of the statistics of 2005, 2010-2011 and 2014. It should be noted that respectively 6.3% (2005), 8.3% (2010-2011) and 10.9% (2014) of the women were unable to give any indication regarding the age at which they underwent the procedure.

**Table 5.8 Age at FGM/C**

Age	2005	2010-2011	2014
<5	72.8%	71.3%	64.2%
5-9	14.9%	13.8%	15.4%
10-14	5.1%	6.0%	8.8%
15+	0.9%	0.7%	0.6%

Important to note is that there might be a trend observable towards performing FGM/C at younger girls, because the proportion of women cut before the age of 5 increased from 54.8% among women aged 45-49 to 69.3% among those aged 15-19.

It does appear that FGM/C occurs at different ages when comparing urban and rural areas. For example, 51.5% of the women living in urban areas reported that they had undergone FGM/C before the age of 5, while 75.8% of the women in rural areas. The DHS-2014 also show that slightly more Muslim women reported to have undergone FGM/C before the age of 5, compared to Christian women (respectively, 64.2% against 56.7%). The proportion of Christian women having FGM/C performed between 10 and 14 years is much higher than among Muslim women (24.4% against 8.6%). The results based on ethnicity show that in the ethnic groups where FGM/C is a common practice, such as the Mandingue and Poular, a high proportion of women underwent the procedure before the age of 5 (respectively 55.7% and 71.2%). In these ethnic groups, the majority of the girls are cut before they are 9 years old.

There are also variations between the high prevalence areas and those areas where FGM/C is not practiced or less practiced. In areas where FGM/C practice is common, a vast majority of girls (61.8% in the South and 92.0% in the North) were cut before the age of 5, against 45.2% in the West and 53.7% in the Central area.

### 5.8 Prevalence of FGM/C among young girls

The DHS 2012-2013 and the DHS-2014 collected data on the prevalence of FGM/C among girls aged 0-14 years. This is very relevant, since FGM/C is practiced at very young ages in Senegal. During these two surveys, all women who had one or more daughter(s) under the age of 15 were asked if one (or more) of them had undergone FGM/C. In case the mother reported that one (or more) girl(s) had undergone FGM/C, the mothers were asked if they had "sewn the genital area" (Type III).

According to the DHS 2012-2013, 17.5% of all girls under 15 had – according to the statements of their mothers – undergone FGM/C. According to the DHS-2014, this proportion was 12.9%. This might indicate a decrease in the practice among young girls.

According to the DHS 2012-2013, 6.8% of the girls aged 0-9 years had undergone the most extreme form of FGM/C and had their genital area closed (Type III). According to the DHS-2014, 5.3% of the girls aged 0-14 years had undergone this type of FGM/C. Type III is especially prevalent among the Soninké (12.4%) and among girls whose mother also underwent type III (11.9%). Table 5.9 provides a more detailed overview of the statistics of FGM/C among young girls.

**Table 5.9 Prevalence of FGM/C among young girls**

Age	2012-2013	2014
<5	10.5%	7.4%
5-9	21%	16.4%
10-14	25.1%	16.9%
0-14	17.5%	12.9%

Overall, the same variations compared to the statistics for all women aged 15-49 can be found in the DHS-2014. Ethnic groups with a high prevalence of FGM/C among young girls are the Mandingue (35.9%), the Poular (28.6%), the Diola (21.7%), and the Soninké (33.2%); and low prevalence can be found among the Wolof (0.2%) and the Serer (1.0%). A high percentage of young girls have undergone FGM/C in the regions in the North (21.6%) and South (38.5%) and low prevalence in the West (4.5%) and Central (1.8%) area. Moreover, the prevalence of FGM/C is much higher when the mother had undergone FGM/C compared to when this is not the case (27.1% against 0.2%). The difference in prevalence between areas of residence is important, the proportion of young girls that have undergone FGM/C are about twice as high in rural areas (16.5) compared to urban areas (8.1%).

It is important to note that the prevalence of FGM/C among young girls decreases, when the education level of the mother increases. The DHS-2014 showed that the prevalence among young girls is 14.7% when the mother has no education compared to 6.7% when the mother has at least completed secondary education.

### **5.9 Beliefs and opinions about FGM/C**

In order to better understand the reasons for the persistence of FGM/C, the DHS-2005, the DHS 2010-2011 and the DHS-2014 included questions about the beliefs and opinions about FGM/C. The DHS-2005 collected data on the benefits for a girl to undergo FGM/C. In total, 48.5% of the women and 58% of the men said that there is no advantage for a daughter to undergo FGM/C. The following benefits of undergoing FGM/C were cited: social recognition, preservation of virginity, religious necessity, better hygiene, better changes for marriage and more sexual pleasure for men. Table 5.10 provides an overview of the benefits of undergoing FGM/C.

Table 5.10 Benefits for a girl to undergo FGM/C

Benefits	2005 (female)	2005 (male)
No benefit	48.5%	58.0%
Social recognition	18.9%	9.8%
Preservation of virginity	13.9%	8.1%
Religious necessity	7.1%	5.3%
Better hygiene	6.4%	4.4%
Better chances for marriage	2.8%	2.4%
More pleasure for men	0.7%	1.5%
Other	18.5%	21.4%

The DHS-2005 also collected data on the benefits for a girl not to undergo FGM/C. In total, 29.1% of the women and 14.1% of the men said that there is no advantage for a daughter not to undergo FGM/C. The following benefits for not undergoing FGM/C were cited: avoiding health problems, less suffering, more sexual pleasure for women, more sexual pleasure for men and not to undergo FGM/C was considered consistent with religion. Table 5.11 provides an overview of the benefits of not undergoing FGM/C.

Table 5.11 Benefits for a girl not to undergo FGM/C

Benefits	2005 (female)	2005 (male)
No benefit	29.1%	14.1%
Less health problems	27.5%	38.2%
Avoids suffering	20.7%	21.7%
More pleasure for women	9.5%	12.6%
More pleasure for men	4.5%	5.8%
In accordance with religion	3.9%	0%
Other	27.4%	34.5%

Unfortunately, the DHS-MICS 2010-11 and the DHS-2014 did not include questions in relation to the benefits of a girl (not) to undergo FGM/C. However, women and men were only asked if they agreed with the following assertions: (i) FGM/C is required by religion and (ii) FGM/C is a way to prevent sex before marriage. Table 5.12 below provides an overview of the answers given.

**Table 5.12 Beliefs in relation to FGM/C**

	2005 (female)	2005 (male)	2010- 2011 (female)	2010- 2011 (male)	2014 (female)	2014 (male)
Required by religion	16.9%	11.6%	17.1%	N/A	15.5%	13.1%
Prevent sex before marriage	30.6%	13.1%	N/A	N/A	N/A	N/A

According to the most recent statistics of the DHS-2014, 79.2% of the women and 75% of men reported that FGM/C is not a required by religion. Among ethnic groups and in areas where FGM/C is more prevalent, the opinion that FGM/C is a religious requirement is more common.

Finally, the opinions on the continuation and/or abandonment of FGM/C were surveyed. The amount of women and men who believe that FGM/C should be abandoned is increasing and the amount of women and men who believe that FGM/C should continue is decreasing. Table 5.13 provides an overview of the statistics of 2005, 2010-2011 and 2014.

**Table 5.13 Opinions on the continuation/abandonment of FGM/C**

	2005 (female)	2005 (male)	2010- 2011 (female)	2010- 2011 (male)	2014 (female)	2014 (male)
FGM/C should continue	17.6%	11.6%	16.6%	N/A	15.9%	11.7%
FGM/C should be abandoned	74.8%	69.3%	78.7%	N/A	80.7%	79.2%

According to the most recent statistics of the DHS-2014, 49.1% of the women who have undergone FGM/C believed that FGM/C should continue, against 45.4% who believed that the practice should be abandoned. This percentage is much higher among women who did not undergo the procedure themselves: 1.7% believed that the practice should continue, against 95.8% who believed that FGM/C should be abandoned. Analysis by region shows that in areas of high prevalence, the majority of women and men believe that FGM/C should continue. Similarly, in the ethnic groups where FGM/C is a common practice, women and men believe that FGM/C should continue.

When the level of education increases, the view that FGM/C should be abandoned is more common: 18.0% of the women and 16.6% of the men without any education believe that the practice should continue, against 7.8% of the women and 8.1% of the men who completed secondary education or higher. The same trend can be observed when the level of welfare of the household improves: 27.9% of women and 23.8% of men from poor households believe that FGM/C should continue, against 5.7% of the women and 7.4% of men from very rich households. It can also be noted that there is also a small difference between Muslim and Christian women: 80.7% of the Muslim women and 79.0%

of the men believe that FGM/C should be abandoned, compared to 87.4% of the Christian women and 83.5% of the Christian men.

## 6 RATIFICATION OF HUMAN RIGHTS TREATIES

### 6.1 Status of ratifications

Senegal became a member of the UN in September 1960, soon after its independence. The country has ratified all nine “core” human rights treaties at the international level as well as regional human rights treaties.<sup>71</sup> Table 5.14 provides an overview of the ratification behaviour of Senegal.<sup>72</sup> The table shows that Senegal did not sign the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP 2), aiming at the abolition of the death penalty. The death penalty was abolished in Senegal by Act No. 2004-38 on 10 December 2004 and the latest execution was carried out in 1967.<sup>73</sup> When the UN Human Rights Council reviewed Senegal’s human rights record under the Universal Periodic Review (UPR) in 2009, Senegal wrote in its national report: “Senegal has ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, which was adopted by the United Nations General Assembly on 15 December 1989.”<sup>74</sup> However, this is not true. Up to today,<sup>75</sup> Senegal did not sign nor ratify the ICCPR-OP 2. During the second UPR in October 2013, several countries (including Australia, Montenegro, Benin, France, Switzerland, Gabon and Rwanda) recommended Senegal to ratify the ICCPR-OP 2. However, Senegal rejected these recommendations.<sup>76</sup> Table 5.14 also shows that Senegal did sign the OP-ICESCR, the OP-CRC-IC, and the OP-CRPD, but these Optional Protocols are not yet ratified. This has consequences for the individual complaints procedure (see also section 7.1.2).

<sup>71</sup> Senegal has also ratified other international human rights instruments, including the following: Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951 (ratified on 9 May 1963) and the Protocol thereto, signed in New York on 31 January 1967 (ratified on 3 October 1967); Rome Statute of the International Criminal Court, adopted on 17 July 1998 (ratified on 2 February 1999); United Nations Convention against Transnational Organized Crime, the supplementary Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the supplementary Protocol against the Smuggling of Migrants by Land, Sea and Air, signed in Palermo, Italy, in December 2000 and ratified on 19 September 2003 in accordance with Act No. 2003-17 of 18 July 2003.

<sup>72</sup> As of 1 October 2015, see Office of the High Commissioner for Human Rights, *Ratification Status for Senegal*, available at [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=153&Lang=en](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=153&Lang=en) [Last Accessed 1 October 2015].

<sup>73</sup> United Nations Committee Against Torture, *Third Periodic Report of Senegal*, CAT/C/SEN/3, 5 October 2011, p. 9, para. 36; United Nations Committee Against Torture, *Concluding Observations, Senegal*, CAT/C/SEN/CO/3, 17 January 2013, p. 2, para. 6.

<sup>74</sup> United Nations General Assembly, *National Report of Senegal*, Human Rights Council, A/HRC/WG.6/4/SEN/1, 5 November 2008, p. 11, para. 74.

<sup>75</sup> As of 1 October 2015.

<sup>76</sup> United Nations General Assembly, *Report of the Working Group on the Universal Periodic Review on Senegal, Addendum*, A/HRC/25/4/Add.1, 4 March 2014, p. 2.

Table 5.14 Ratification status for Senegal

Treaty	Signature Date	Accession (a) or Ratification Date	Declarations/Reservations	Recognition of specific competences of treaty bodies
ICERD	22-07-68	19-04-72	None	Individual communications (art. 14): Yes (03-12-1982)
ICESCR	06-07-70	13-02-78	None	
OP-ICESCR	24-09-09	N/A	N/A	
ICCPR	06-07-70	13-02-78	None	Inter-State complaints (art. 41): Yes (05-01-1981)
ICCPR-OP 1	06-07-70	13-02-78	None	
ICCPR-OP 2	N/A	N/A	N/A	
CEDAW	29-07-80	05-02-85	None	Inter-State complaints (art. 21): Yes (16-10-1996) Individual communications (art. 22): Yes (16-10-1996)
OP-CEDAW	10-12-99	26-05-00	None	
CAT	04-02-85	21-08-86	None	
OP-CAT	04-02-03	18-10-06	None	Inter-State complaints (art. 76): No Individual Complaints (art. 77): No
CRC	26-01-90	31-07-90	None	
OP-CRC-AC	08-09-00	03-03-04	Yes	
OP-CRC-SC	08-09-00	05-11-03	None	Individual Complaints (art. 31): No
OP-CRC-IC	01-10-12	N/A	N/A	
ICRMW	N/A	09-06-1999 (a)	None	
CRPD	25-04-07	07-09-10	None	Individual Complaints (art. 31): No
OP-CRPD	25-04-07	N/A	N/A	
ICED	06-02-07	11-12-08	None	
ACHPR	23-09-81	13-08-82	None	Individual Complaints (art. 31): No
Maputo Protocol	26-12-03	27-12-04	None	
ACRWC	18-05-92	29-09-98	None	
African Youth Charter	09-10-07	17-09-09	None	



## 6.2 Reservations and declarations

As table 5.14 shows, Senegal has not made any reservations to the treaties that they have ratified. Senegal made only one declaration with the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in Armed Conflict (OP-CRC-AC).<sup>77</sup>

## 6.3 Trying to understand the ratification behaviour of Senegal

During the interviews, I sought to identify what factors influenced Senegal's decisions to sign and ratify international and regional human rights treaties. Although I realized that one could never know specifically why treaties are signed and ratified, and what the Senegalese State motivated to enter into treaty-based agreements, I was interested in the point of view of the respondents. The answers of the respondents enabled me to understand the reasons and justifications why Senegal signed and ratified the international human rights instruments listed in table 5.14.

First of all, I noticed that all respondents were well aware of the strong ratification record of Senegal. Many respondents referred to Senegal as the "champion of ratification in Africa" and stated that Senegal is "a country of human rights." A government representative said: "human rights are deeply rooted in our culture since our independence." The respondents also noted that Senegal is often one of the first (African) countries that signs and ratifies a human rights treaty.<sup>78</sup> A representative of civil society said: "They sign quickly and they sign everything."

Secondly, some representatives of civil society organizations referred to the importance of the context in which the ratification behaviour of Senegal should be placed. Although the DHS showed that the levels of education in Senegal are quite low, these respondents explained me that the Senegalese elite is highly educated. They often studied abroad, mostly in France as a result of the colonial ties. The Senegalese elite recognizes the importance of being part of the international community, ratifying human rights treaties and having legislation in place. One representative of a civil society organization explained: "I think there is a sort of mindset within the educated population of Senegal that legal instruments are critical and important." The respondent further explained that the elite stood up for human rights: "They went to university and believe in equality and justice and have a much easier time of accepting and being open to these things." Below, an overview is given of the various factors that – according to the respondents – influenced Senegal's ratification behaviour.

<sup>77</sup> Senegal declared that the minimum age required for regular conscription and for entry into the schools for officers and sub-officers is twenty years. Furthermore, candidates shall enlist in an individual capacity and shall sign enlistment and re-enlistment contracts freely and in person.

<sup>78</sup> Senegal was for example the first country to ratify the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights and Senegal was also the first country that has ratified the Rome Statute of the International Criminal Court.

### 6.3.1 Political will to promote human rights

Further analysis of the data revealed that the majority of the respondents see Senegal as a State that is deeply committed to respect human rights and fundamental freedoms. Many respondents (including representatives from the government, civil society and international organizations) explained that the fact that Senegal ratified many international human rights instruments, bears witness to the political will of the Senegalese authorities to protect the citizens of their country against human rights violations. They believe that there is a sincere desire and engagement of the government to improve the human rights condition on the ground. A representative of an international organization explained: "The Senegalese government has a real political will to have a national framework in accordance with international standards of law." A representative of civil society said: "I believe that the State of Senegal has a mentality, a willingness to respect human rights." Some respondents (mostly representatives of the government) pointed in this respect to the active engagement in legislative efforts at the international and regional levels that demonstrate to the Senegalese Government's steadfast political will to protect and promote human rights.<sup>79</sup> Indeed, Senegal helped to codify international human rights law by actively participating in the drafting process of several treaties, including the CRC.<sup>80</sup> Senegal was also one of the founding members of the Organisation of Africa Unity (OAU). Representatives of the government also referred to the first meeting of a committee of experts in 1979 hosted in Dakar to draft a regional human rights instrument for Africa.<sup>81</sup> A Senegalese judge, Keba M'Baye, is generally regarded as the "father" of the African Charter on Human and Peoples' Rights.<sup>82</sup> In addition, representatives of the government also referred to the prominent positions held by Senegalese leaders in international human rights work since the early 1990s.

### 6.3.2 Example in the sub-region

Many respondents (including representatives from the government, civil society and international organizations) explained that the Senegalese government cares a lot about the image of the country. Senegal would like to be perceived as a country that is respectful in the promotion and protection of human rights, they said. A representative of civil society explained: "Senegal wants to be among the good students in the classroom." Some respondents argued that Senegal wants to set a good example for other African countries and even make other countries ratify human rights treaties. In this regard, a representative of civil society argued: "they want to be a mirror for Africa." Other respondents (mainly representatives of civil society) pointed to the fact that Senegal is in general a very proud country. More specifically, they are

<sup>79</sup> See also United Nations Committee Against Torture, *Third Periodic Report of Senegal*, CAT/C/SEN/3, 5 October 2011, p.9, para. 33.

<sup>80</sup> United Nations Committee on the Rights of the Child, *Concluding Observations, Senegal*, CRC/C/15/Add.44, 27 November 1995, p. 1, para. 3.

<sup>81</sup> See also R. Gittleman, *The African Charter on Human and People's Rights: A Legal Analysis*, *Virginia Journal of International Law*, Volume 22, Issue 4, 1982, p. 667-668.

<sup>82</sup> See also A. El-Obaid and K. Appiagyei-Atua, *Human Rights in Africa - A New Perspective on Linking the Past to the Present*, *MCFill Law Journal*, Volume 41, 1996, p. 827.

proud to be an exception in the region with regard to the level of democracy and the absence of a military coup. A representative of an international organization argued: "We are seen as a good model of African democracy." Furthermore, a government representative stated: "Senegal is a democratic country, a big country, which respects democracy, which respects human rights." Some respondents (including civil society, international organizations and the government) stated that Senegal likes to be ahead of other African countries and wants to be perceived as a "leader" in West Africa. The preamble of the Constitution that refers to "the will of Senegal to be a modern State"<sup>83</sup> also hints in that direction. A few respondents (representatives of international organizations) said that the Senegalese have a better understanding about the body of human rights treaties compared to other African countries. A representative of civil society argued that Senegal ratifies all the human rights treaties mainly because "it is just because they are afraid that their counterpart would look down at them."

### 6.3.3 Diplomatic reasons

Some respondents (including representatives from the government, civil society and international organizations) explained that human rights have played an important part in establishing foreign relations. Senegal wants to show their engagement and commitment towards human rights at the regional and international level, because "the country wants to have a good relationship with other countries", according to a civil society representative. Senegal belongs to the international community and wants to be part of the global human rights movement. According to a civil society representative, signing up to treaties is a way to improve bilateral ties. The Senegalese diplomacy is a contributing factor to ratify human rights treaties. Further more, a civil society representative said: "the Senegalese government want to do what the others do."

### 6.3.4 Role of the president

From the start, the first Senegalese President, Leopold Senghor, considered international relations to be of great importance and the country had been committed to consolidate democracy and the rule of law as well as the respect for the protection of human rights.<sup>84</sup> Some respondents (including representatives from the government, civil society and international organizations) pointed to the fact that President Leopold Senghor was very "open-minded" and "encouraging" in this regard. They explained that the leader of their country believed in human rights and that he wanted to extend his influence in West Africa. Some civil society representatives said that he would go very far in the sense that "he wanted to please the West so much that he would accept everything."

The important role Senegal played during the drafting process of the African Charter on Human and Peoples' Rights is already demonstrated above. In

<sup>83</sup> Constitution of the Republic of Senegal, 2010, as amended to Constitutional Law No. 2009-22 of 19 June 2009, preamble.

<sup>84</sup> See also C.H. Heyns and F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, Martinus Nijhoff Publishers, 2002, p. 518.

addition, according to the African Commission on Human and Peoples' Rights, it is important to note that "the work of the Expert Committee was greatly influenced by the opening address of the host president, President Senghor, who joined the Committee to draw inspiration from African values and tradition and also to focus on the real needs of Africans, the right to development and the duties of individuals."<sup>85</sup>

#### *6.3.5 Pressure of the international community*

Some representatives of civil society argued that the Senegalese government signed and ratified human rights treaties, because they felt pressure from the international community to do so. More specifically, according to these respondents, the Senegalese authorities feel the pressure to be part of the globalization and the international human rights movement.

#### *6.3.6 Pressure of CSOs*

Some representatives of civil society explained that CSOs in Senegal have a very strong voice. They argued that civil society organizations – mostly women's rights groups – were fighting for ratifications of international and regional human rights treaties. These representatives argued that they have been very active and promoted human rights for many years. They explained that CSOs were very much aware of the existence of the treaties and engaged to push the government to sign and ratify these treaties and conventions and to harmonize at the national level. One civil society representative said: "We have some organizations that are really playing their watchdog role about the violation of human rights and they even have ways to reporting at international level."

#### *6.3.7 Requirement to receive donor aid*

Since its independence, Senegal is dependent on international co-operation and foreign aid. In relation to the distribution of foreign aid among recipient countries, some representatives of civil society pointed to economic factors that play a role in human rights treaty ratification.<sup>86</sup> They argued that the ratification of human rights treaties has secured aid to Senegal: "They signed up to these conventions so they can receive aid, that's for sure. [...] Because if they don't, then they miss out on all these things that they can get."

### **6.4 Reference to compliance gap**

When respondents were asked the question about the ratification behaviour of Senegal, an overwhelming majority of the respondents (including representatives from the government, civil society and international organizations) immediately expressed their concern about the gap between Senegal's propensity to join international and regional human rights treaties on

<sup>85</sup> See the website of the African Commission on Human and Peoples' Rights, available at <http://www.achpr.org/instruments/achpr/history/> [Last Accessed 1 October 2015].

<sup>86</sup> See also A. Magesan, Human Rights Treaty Ratification of Aid Receiving Countries, *World Development*, Volume 45, May 2013, p. 175-188.

the one hand, and to bring their human rights practice into compliance with those treaties on the other. They explained that becoming a party to a treaty is only the first step, because recognition of rights on paper is not sufficient to guarantee that they will be enjoyed in practice. A representative of an international organization argued: "The fact that Senegal has been ratifying all these treaties and conventions doesn't mean that the human rights situation on the ground is much better compared to the human rights situation of other similar countries in the region." A representative of civil society said: "We ratify a lot, but the implementation is very limited, sometimes even non-existent." Another civil society representative stated: "Senegal ratifies everything possible at the international level. [...] However, the problem is that after the ratification, there is no application." A government representative said: "Senegal ratified everything, almost everything, but they do not respect these conventions, once they are ratified." These respondents clearly pointed to the limited implementation of the human rights treaties and identified problems related to putting human rights into practice. A representative of civil society said: "The problem is that after the ratification, there is no application." Another representative of civil society said: "It is good to have international laws, but we also have to think about the practice." Another representative of civil society said: "The thing is that signing doesn't necessarily mean applying. Applying is another thing. The problem that they still have is that they are always ready to sign human rights conventions, but applying the actual law in real time, in real society, that's the issue." Another civil society representative said: "Adopting a convention is good, but it is better to well-implement it." Another civil society representative said: "Because even there is ratification at the international level and even Senegal accepted and adopted these treaties, we can talk about ratification, but we have also to talk about the concrete ratification. Like, how it's going in the practice. Is it respected or not? [...] So, we can talk about the international ratification, but we also have to talk about what is going in the practice."

## 7 TREATY MONITORING BODIES

This section examines the cooperation of Senegal with the Treaty Monitoring Bodies (TMBs). First, a short introduction is given about the functions of the TMB. Afterwards, a general analysis is given of the consideration of Senegal's periodic reports by the TMB, including remarks about the human rights situation in Senegal in general, Senegal's cooperation, the issue of non-compliance with reporting guidelines and the problem of outstanding and overdue reports. Lastly, an analysis is provided specifically in relation to the issue FGM/C in Senegal. An overview is given of the national reports of Senegal that discussed the issue FGM/C, as well as the concluding observations of the various TMB that provide recommendations, concerns and compliments in relation to FGM/C in Senegal.

### 7.1 Introduction to the Treaty Monitoring Body System

The previous paragraph showed that Senegal is a State Party to all the "core" human rights treaties. These treaties provide the normative framework to

support the implementation of human rights norms at the national level. The principal objective of the human rights TMB system is to monitor compliance with these human rights standards in order to offer protection at the national level through the implementation of the human rights obligations contained in the treaties.<sup>87</sup> The TMB perform a number of functions in accordance with the provisions of the treaties that established them.

#### *7.1.1 Consideration of State Parties' periodic reports*

In the first place this includes the consideration of State Parties' periodic reports. When a country ratifies a UN treaty, it assumes a legal obligation to implement the rights recognized in that treaty. In addition to their obligation to implement the substantive provisions of the treaty, each State Party is also under an obligation to submit periodic reports to the relevant treaty body on how the rights are being implemented. States must report initially one year after acceding to the Covenant and then whenever the Committee requests (usually every four years). The TMB examines each National Report and advises States on ways to achieve better compliance with human rights obligations. They address their concerns and recommendations to the State Party in the form of "Concluding Observations."

#### *7.1.2 Individual complaints procedures*

In the second place, some of the TMB<sup>88</sup> may, under certain conditions, receive and consider individual complaints or communications from individuals who feel that his or her rights have been violated. Individual complaints can be brought only against a State that has recognized the competence of the committee established under the relevant treaty or when the State became a party to the relevant Optional Protocols. The Senegalese government recognized the competence of four human rights TMBs (namely the Committee on the Elimination of Racial Discrimination (CERD),<sup>89</sup> Human Rights Committee (HRC),<sup>90</sup> CEDAWCee<sup>91</sup> and Committee against Torture (CAT))<sup>92</sup> to

<sup>87</sup> International Human Rights Instruments, *Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body: Report by the Secretariat*, HRI/MC/2006/2, 22 March 2006, p. 4, para. 4.

<sup>88</sup> The Committee on the Elimination of Racial Discrimination (CERD), Committee on Economic, Social and Cultural Rights (CESCR), Human Rights Committee (HRC), Committee on the Elimination of Discrimination Against Women (CEDAWCee), Committee against Torture (CATCee), Committee on the Rights of the Child (CRCee), Committee on the Rights of Persons with Disabilities (CRPD) and Committee on Enforced Disappearances (CED) may receive and consider individual complaints. For the Committee on Migrant Workers (CMW), the individual complaint mechanism has not yet entered into force [as of 1 October 2015]. Article 77 of the ICRMW gives the Committee on Migrant Workers (CMW) competence to receive and consider individual communications alleging violations of the Convention by States parties who made the necessary declaration under Article 77. This individual complaint mechanism will become operative when 10 parties have made the necessary declaration under Article 77. Senegal did not make the declaration under Article 77 either and thus did not recognize the competence of the Committee.

<sup>89</sup> Senegal specifically recognized in 1982 in accordance with Article 14 of the Convention the competence of the CERD Committee to receive and consider communications from individuals within its jurisdiction claiming to be victims of a violation by Senegal of any of the rights set forth in the CERD. So far, no communications have been submitted to the CERD Committee.

<sup>90</sup> The ICCPR-OP1 established an individual complaints mechanism, allowing individuals to complain to the Human Rights Committee about violations of the Covenant. By becoming a State Party to the ICCPR-OP1 in 1978, Senegal recognized the competence of this Committee to receive

receive and consider communications from individuals.<sup>93</sup> However, there are no complaints submitted at UN TMB concerning FGM/C. Under the African system, the competence of the Committees does not have to be explicitly recognized, but its jurisdiction is compulsory and automatic for those States that ratify its founding treaty. Senegal ratified the ACHPR and the ACRWC and thus recognized automatically the competences of the African Commission on Human and Peoples' Rights (ACmHPR)<sup>94</sup> and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC).<sup>95</sup> So far, there have been four communications received by the ACmHPR against Senegal, but they were all ruled inadmissible.<sup>96</sup> The ACERWC had thus far only received three

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and consider individual communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. One communication has been submitted and finalized by the UN Human Rights Committee in 1994, namely the case of *Famara Koné v. Senegal*.

<sup>91</sup> Senegal became a State Party to the CEDAW-OP in 2000 and therefore recognized the competence of the CEDAW Committee to receive and consider communications submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party. So far, no communications have been submitted to the CEDAW Committee.

<sup>92</sup> In 1996, Senegal made a declaration under article 22 CAT to recognize the competence of the CAT Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. So far, one communication is submitted to the UN Committee Against Torture, namely the case of *Suleymane Guengueng et al. v. Senegal*.

<sup>93</sup> Since Senegal is not a State Party to the Optional Protocols of the CESC and the CRPD, it does not recognize the competence of the CESC Committee and the CRPD Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the respective Covenant and the Convention. Although Senegal signed and ratified the CED, the country did not declare that it recognizes in accordance with Article 31 CED the competences of the CED Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. In April 2014, the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OP-CRC-IC) entered into force following its ratification by the required 10 UN Member States. This third Optional Protocol gives competence to the CRC Committee to receive and consider individual communications alleging violations of the CRC and its Protocols (OP-CRC-AC and OP-CRC-SC) by States parties to the Optional Protocol (on a communications procedure). Senegal signed the OP-CRC-IC in October 2012, but did not ratify it. Therefore, individual children from Senegal cannot submit complaints regarding specific violations of their rights under the Convention and its first two optional protocols.

<sup>94</sup> The ACmHPR developed its Rules of Procedure in such a way to accept communications from individuals alleging human rights violations by a state party. States, individuals or organizations on behalf of an individual may submit a complaint to the Commission. The process for filing a communication to the ACmHPR is specified under Articles 55-58 of the African Charter. The Commission considers communications from individuals if a simple majority of its members so decide (Article 55.2). Article 56 of the African Charter details the conditions under which the African Commission on Human and Peoples' Rights may receive complaints from individuals. According to Article 46, the ACHPR can call upon any form of investigation that is deemed appropriate.

<sup>95</sup> The ACERWC's competences come from Article 44 of the ACRWC. Under Article 44, the ACERWC may receive communications, from any person, group or NGO recognized by the Organization of African Unity, by a Member State, or the United Nations relating to any matter covered by the Charter. The ACERWC has developed guidelines on communications.

<sup>96</sup> 162/97 Mouvement des réfugiés mauritaniens au Sénégal / Senegal; 304/05 FIDH, Organisation nationale des droits de l'Homme (ONDH) and Rencontre africaine pour la défense des droits de l'Homme (RADDHO) / Senegal; 254/02 Mouvement des réfugiés mauritaniens au Sénégal pour la

communications.<sup>97</sup> None of these communications concerned FGM/C.

As the above shows, the individual complaints procedure has hardly played a role in Senegal. A reason put forward by Heyns and Viljoen is that people, including lawyers, are mostly unaware of the specific mechanisms for possible implementation and the “potential of the UN complaints system.”<sup>98</sup> In addition, the Senegalese legal scholar Mbaye argued that the individual complaints procedure is incompatible with Senegalese culture. According to his view, “traditional African reluctance to engage in confrontational litigation has resulted in a general resistance to ‘modern’ law. The limited number of communications to the UN human rights treaty bodies corresponds with the small number of constitutional complaints lodged in the domestic system. The resistance is all the more pronounced in respect of more remote and recent systems, such as that of the UN.”<sup>99</sup> Other factors that explain the limited number of communications submitted following from the research done by Heyns and Viljoen are: the high illiteracy rate, resulting in a lack of information, and a lack of financial means. They also found some practical obstacles, for example the requirement that all available domestic remedies have to be exhausted: “Exhausting local remedies is not only very costly, in the absence of legal aid, but also a very long process. It is not uncommon for a case to take five years to proceed to the level of the highest domestic court. In respect of CAT, the possibility of using the procedure has been open for only three years.”<sup>100</sup>

### 7.1.3 Inter-State complaint procedures

In the third place, some TMB<sup>101</sup> set out procedures that allow State Parties to initiate a procedure against another State Party, which is not giving effect to the provisions of the Convention. In most cases, such a complaint may only be submitted if both States parties have made a declaration accepting the competence of the Committee in this regard. Senegal only recognized the competence of the HRC and the CATCee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the respective Conventions. However, no such inter-State complaint has ever been made and these procedures have never

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defense des droits de l'Homme / Senegal; 226/99 Union Nationale des Syndicats Autonomes du Sénégal (UNSA) / Senegal.

<sup>97</sup> These communications allege violations of children's rights by Kenya, Uganda, and Senegal. Of these three, only the communication involving Kenya (Decision No 002/Com/002/2009) has been resolved. The communication against Senegal alleges that children in Senegal are sent by their parents to live at religious schools (known as *daaras*) to receive religious education, and the children are then forced by their instructors at the schools (known as *Marabouts*) to beg in the streets. If the children fail to collect enough food or money from their begging, they are customarily beaten. It is the most recent communication filed with the ACERWC and was submitted in July 2012 by Centre for Human Rights (based at the University of Pretoria in South Africa) and *La Rencontre Africaine pour la Défense des Droits de l'Homme* (“RADDHO”; based in Senegal).

<sup>98</sup> C.H. Heyns and F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, Martinus Nijhoff Publishers, 2002, p. 523 and p. 535.

<sup>99</sup> C.H. Heyns and F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, Martinus Nijhoff Publishers, 2002, p. 535.

<sup>100</sup> *Ibid.*

<sup>101</sup> Including ICERD (Article 11), OP-ICESCR (Article 10), ICCPR (Article 41), CAT (Article 21), OP-CRC-IC (Article 12), ICRMW (Article 74) and CED (Article 32).



been used. The ACmHPR is also authorized to consider inter-State communications about breaches of human rights (art. 47–49 and 52 of the African Charter). State Party can, if they allege that another State is violating the obligations of the ACHPR submit a case to the ACHPR. The inter-State communications procedure has been used once in 1999, in which Senegal was not involved.<sup>102</sup>

#### 7.1.4 Inquiry procedures

In the fourth place, some TMB<sup>103</sup> may, on their own initiative, initiate inquiries upon receipt of reliable information containing well-founded indications of serious, grave or systematic violations by a State Party of the Conventions they monitor. Inquiries may only be undertaken with respect to States parties who have recognized the competence of the relevant Committee in this regard. States may opt out, at the time of signature or ratification or accession by making a declaration that they do not recognize the competence of the Committee in question to undertake inquiries. The Senegalese government recognized the competence of three human rights treaty bodies (namely the CEDAWCee,<sup>104</sup> CATCee<sup>105</sup> and CED<sup>106</sup>)<sup>107</sup> to initiate an inquiry procedure, but Senegal was never invited to cooperate in any inquiry procedure.

### 7.2 Consideration of Senegal's Periodic Reports

#### 7.2.1 Remarks about the human rights situation

Several TMB commended the delegation of Senegal for its efforts to establish a democratic State based on the rule of law.<sup>108</sup> The members of the CERD pointed out that Senegal was a tolerant country that promoted human rights<sup>109</sup> and welcomed Senegal's "obvious commitment to human rights and the important role Senegal played at the international level."<sup>110</sup> The CRCee also recalled the active participation of the Senegalese government in the drafting process of the CRC and expressed satisfaction at the early ratification of the CRC by

<sup>102</sup> Democratic Republic of Congo vs. Burundi, Rwanda, and Uganda, 15th annual activity report 1001-2 227/99.

<sup>103</sup> Including CESCRR, CEDAWCee, CATCee, CRCee, CRPD and CED.

<sup>104</sup> Senegal ratified the OP-CEDAW in 2000 and therefore the country recognized the competence of the CEDAWCee to start an inquiry procedure (under Article 8 OP-CEDAW). The CEDAWCee never invited Senegal to cooperate in an inquiry procedure.

<sup>105</sup> With the ratification of the CAT in 1986, Senegal recognized in the second place the competence of the CATCee to start an inquiry procedure (under Article 20 CAT). The CATCee never took the initiative to investigate allegations of systematic torture being practiced in Senegal.

<sup>106</sup> Senegal ratified the ICED in 2008 and recognized the competence of the CED to start an inquiry procedure (under Article 33 CED). The CED never undertook a visit to investigate violations of the provisions of the CED in Senegal.

<sup>107</sup> Since Senegal is not a State Party to the CESCRR-OP, the CRC-OP-IC and the CRPD-OP, it does not recognize the competence of these three TMBs to initiate inquiries.

<sup>108</sup> United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations, Senegal*, A/42/18 9 (para. 227-245), 12 March 1986, p. 53, para. 229.

<sup>109</sup> *Ibid.*

<sup>110</sup> United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations, Senegal*, Supplement No. 18, A/49/18, 17 August 1994, p. 53, para. 335.

Senegal.<sup>111</sup> The HRC further noted that the Government and people of Senegal were “deeply attached to the principle of respect for human rights.”<sup>112</sup>

### 7.2.2 *Remarks about cooperation*

In some instances, the TMB expressed their satisfaction about the collaboration with Senegal. The CATCee thanks the Senegalese delegation “for its frank collaboration, as demonstrated by its constructive dialogue with the Committee.”<sup>113</sup> The HRC showed its “warm appreciation to the delegation of Senegal for its co-operation and for the competence it had shown in responding to questions and providing explanations concerning the implementation of the Covenant in Senegal.”<sup>114</sup> The CERD was also “satisfied with the frank and constructive dialogue it held with the delegation of the State Party, which included representatives of a number of ministries, and notes with satisfaction the oral statement and detailed replies provided by the delegation during its consideration of the report.”<sup>115</sup> The CESCR expressed its appreciation for the detailed report submitted by Senegal and the additional information provided by the delegation of Senegal in response to the Committee’s questions and comments.<sup>116</sup> The CRCee also “appreciated the open, frank and constructive dialogue with the multisectoral delegation.”<sup>117</sup>

### 7.2.3 *Non-compliance with reporting guidelines*

However, the TMB were not always positive. Critical notes about non-compliance with reporting guidelines can be found in several Concluding Observations. The TMB were in some instances quite critical about the quality of the reports submitted. When the CERD considered the ninth and tenth periodic reports of Senegal, they said that the report was silent on several important points: “it contained almost no information on the effective implementation of national legislation on discrimination; it contained only very general and abstract information on the implementation of articles 5, 6 and 7 of the Convention; it did not contain any information on judicial practice; and, in particular, it made no mention of cases where the provisions of the Convention had been invoked in court, where associations had been banned, or where perpetrators of acts of racial discrimination had been prosecuted and punished.”<sup>118</sup> When the CERD considered the sixteenth, seventeenth and

<sup>111</sup> United Nations Committee on the Rights of the Child, *Concluding Observations, Senegal*, CRC/C/15/Add.44, 27 November 1995, p. 1, para. 3.

<sup>112</sup> United Nations Human Rights Committee, *Concluding Observations, Senegal*, A/42/40(para. 197-238), 6 April 1987, p. 59, para. 220.

<sup>113</sup> United Nations Committee Against Torture, *Concluding Observations, Senegal*, Supplement No. 44, A/51/44, 1 May 1996, p. 19, para. 103.

<sup>114</sup> United Nations Human Rights Committee, *Concluding Observations, Senegal*, A/42/40(para. 197-238), 6 April 1987, p. 59, para. 220.

<sup>115</sup> United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations, Senegal*, CERD/C/SEN/CO/16-18, 24 October 2012, p. 1, para. 2.

<sup>116</sup> United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations, Senegal*, E/C.12/1993/18, 5 January 1994, p. 1, para. 2.

<sup>117</sup> United Nations Committee on the Rights of the Child, *Concluding Observations, Senegal*, CRC/C/SEN/CO/2, 20 October 2006, p. 1, para. 2.

<sup>118</sup> United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations, Senegal*, Supplement No. 18, A/49/18, 17 August 1994, p. 53, para. 336.

eighteenth periodic reports of Senegal, it noted that the report “does not contain sufficient information on the practical application of the Convention.”<sup>119</sup> When the CESCR considered the second periodic report of Senegal, it was particularly concerned that the report “lacks detailed information and statistical data as to the concrete measures and policies which have been adopted to implement the Covenant rights.”<sup>120</sup> When the HRC considered the third periodic report of Senegal, the Committee found that the report “focuses on laws and administrative regulations rather than on the actual implementation of the Covenant’s provisions and contains little information on factors and difficulties encountered in their application.”<sup>121</sup> Again, when the HRC considered the fourth periodic report, it reiterated its previous comment on the State Party’s third periodic report, “regretting the lack of information in the document on implementation of the provisions of the Covenant in practice.”<sup>122</sup> The CEDAWCee regretted the absence of information regarding the factors and difficulties that were impeding the implementation of the Convention.<sup>123</sup> More specifically, the Committee felt that the second report should have addressed the actual situation of women to determine their progress, and it was suggested that “the next report should include more statistical data on the de jure and de facto situations.”<sup>124</sup> Apart from the fact that the Senegalese National Reports paid insufficient attention to the practical implementation and de facto enjoyment of rights by individuals, the country did not always follow the guidelines for the preparation of reports with the result that some areas covered by the Conventions were not addressed in the report.<sup>125</sup> When the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) considered the initial report of Senegal, the Committee regretted that “during the dialogue several of the questions went unanswered, that it did not receive in writing all the replies to its list of issues and that the replies that it did receive did not arrive in time to be translated into the Committee’s other working languages.”<sup>126</sup> It happened more often that the Senegalese delegation did not provide written replies to the list of issues.<sup>127</sup> The CESCR also deeply regretted the absence of a delegation from the State Party when they considered the second periodic report of Senegal. Consequently, the

<sup>119</sup> United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations, Senegal*, CERD/C/SEN/CO/16-18, 24 October 2012, p. 1, para. 2.

<sup>120</sup> United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations, Senegal*, E/C.12/1/Add.62, 24 September 2001, p. 2, para. 3.

<sup>121</sup> United Nations Human Rights Committee, *Concluding Observations, Senegal*, CCPR/C/79/Add.10, 28 December 1992, p. 1 para. 2.

<sup>122</sup> United Nations Human Rights Committee, *Concluding Observations, Senegal*, CCPR/C/79/Add.82, 19 November 1997, p. 1, para. 2.

<sup>123</sup> United Nations Committee on the Elimination of Discrimination Against Women, *Concluding Observations, Senegal*, A/49/38(SUPP) para. 666-728, 12 April 1994, p. 126, para. 718.

<sup>124</sup> *Ibid*, p. 121, para. 679.

<sup>125</sup> United Nations Committee on the Rights of the Child, *Concluding Observations, Senegal*, CRC/C/15/Add.44, 27 November 1995, p. 1, para. 2.

<sup>126</sup> United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Concluding Observations, Senegal*, CMW/C/SEN/CO/1, 10 December 2010, p. 1, para. 2.

<sup>127</sup> United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations, Senegal*, E/C.12/1/Add.62, 24 September 2001, p. 1, para. 2.

Committee was denied the opportunity of having a detailed and constructive dialogue with representatives of the State Party.<sup>128</sup>

#### 7.2.4 Outstanding and overdue reports

Since Senegal is a State Party to all the “core” human rights treaties, the country is obliged to submit periodic reports to all TMB on how the human rights are being implemented. Nine “core” international human rights treaties and two optional protocols establish a reporting obligation for States parties. At the time of this research,<sup>129</sup> Senegal submitted 29 reports<sup>130</sup> to the various UN TMB. Table 5.15 provides an overview of Senegal’s reporting status. It shows that there are currently five reports overdue, namely the nineteenth to twenty-second reports of the CERD (since May 2015), the third periodic report of the CESCR (since 2003), the fifth periodic report of the HRC (since 2000), as well as the initial reports of the OP-CRC-AC (since 2006) and the OP-CRC-AC (since 2005).

Table 5.15 Cooperation with UN Treaty Monitoring Bodies

Treaty body	Latest report submitted	Due date	Reporting status
CERD	25-02-11	19-05-15	Nineteenth to twenty-second reports overdue since 2015
CESCR	28-09-99	30-06-03	Third report overdue since 2003
HRC	19-09-95	04-04-00	Fifth report overdue since 2000
CEDAWCee	31-07-13	01-07-19	Eighth report due in July 2019
CATCee	09-02-11	23-11-16	Fourth report due in 2016
CRCee	29-04-13	Unknown	Waiting for concluding observations
CMW	01-12-09	01-11-15	Second report overdue in 2015
CRPD Cee	23-03-15	Unknown	Waiting for concluding observations
CED	28-04-2015	Unknown	Waiting for concluding observations
OP-CRC-AC	x	03-04-06	Initial report overdue since 2006
OP-CRC-SC	x	05-12-05	Initial report overdue since 2005

However, since this table only shows the latest report submitted and the due date, it does not show that there have been in the past more (extreme) delays in the submission of periodic reports to the TMB. It took the Senegalese

<sup>128</sup> United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations, Senegal*, E/C.12/1/Add.62, 24 September 2001, p. 1, para. 2.

<sup>129</sup> As of 1 October 2015, see Office of the High Commissioner for Human Rights, *Reporting Status for Senegal*, available at [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/countries.aspx?CountryCode=SEN&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=SEN&Lang=EN) [Last Accessed 1 October 2015].

<sup>130</sup> Counting the consolidated reports (for example the fifth to seventh periodic report to the CERD, the third to sixth periodic report to the CAT and the third to the fifth periodic report to the CRCee) as one report.

government for example 22 years to submit the third to seventh periodic report to the CEDAWCee. The initial report was submitted in 1986, the second in 1991 and the third to seventh periodic report in 2013. The combined sixteenth, seventeenth and eighteenth periodic reports to the CERD were submitted 7 years late, which the CERD regretted.<sup>131</sup> The initial report of Senegal concerning the rights covered by Articles 6 to 9 of the ICESCR was submitted nearly 10 years late, which the CESCR regretted.<sup>132</sup> The third periodic report to the CAT was submitted 15 years late, which the CATCee regretted.<sup>133</sup> The second periodic to the CRCee was submitted 8 years late. Unfortunately, this is not only the case for the UN TMB system, but also for the African Union's monitoring system. Senegal's initial report to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) was due in 2001, but Senegal has submitted its initial, first and second report in 2009.<sup>134</sup>

During the interviews, I explored the views of my respondents regarding, amongst others, the reasons behind the (sometimes extreme) delay in the submission of periodic reports of the Senegalese government to the TMB, which are described below.

#### *Political will*

The respondents gave a rather mixed picture regarding the role of political will in relation to the delays. About half of the respondents (including representatives from civil society organizations, international organizations and the government) explained that the Senegalese government is "engaged" and "motivated" to submit periodic reports to the respective TMB on the implementation of their treaty obligations. The other half of the respondents (including representatives from civil society organizations, international organizations and the government) claimed just the opposite and explained that there is a "lack of political will and wish" to adhere to their treaty obligations. A civil society representative said that the Senegalese government "does not want to put effort in writing a report that is going to the West, to prove to them that we are good people." However, all respondents indicated that there are some essential additional problems (apart from the political will) at the national level preventing the State to live up to their reporting obligations. These problems are listed below.

#### *Institutional instability*

The most frequently mentioned reason for the delay in the submission of periodic reports of the Senegalese government was the problem of institutional instability and the lack of continuity at the Ministerial level. Representatives of international organizations mostly indicated this reason during the interviews, but a few civil society and government representatives mentioned this problem

<sup>131</sup> United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations, Senegal*, CERD/C/SEN/CO/16-18, 24 October 2012, p. 1, para. 2.

<sup>132</sup> United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations, Senegal*, E/C.12/1993/18, 5 January 1994, p. 1, para. 2.

<sup>133</sup> United Nations Committee Against Torture, *Concluding Observations, Senegal*, CAT/C/SEN/CO/3, 17 January 2013, p. 1, para. 2.

<sup>134</sup> The Committee began examining State Party reports during its 11th Session in May 2008.

as well. A representative of an international organization said: “I think that one of the main issues for a country like Senegal is the institutional instability. We went through a lot, a lot, a lot of changes.” One representative from civil society explained that when the government changes, the technical staff often also changes and that there is no good follow-up: “the institutions are empty when the people leave, because the ministers leave with their cabinet and with all the documents.” A representative of an international organization said: “When people move, they do not hand over their tasks. They just leave. There is no coordination.” A government representative acknowledged this problem and referred in this regard to the development of recently submitted CEDAW report. Although this CEDAW report stated that the preparation of the report began in August 2012, when a ministerial decision was taken to set up the technical committee,<sup>135</sup> the representative explained that people within the Ministry of Women, Family and Children started writing the report already in 2000. However, when the cabinet changed, their successors did not continue writing the report and the process were not completed. A civil society representative stated: “We worked on the CEDAW report a few years ago with many civil society organizations. The Family Ministry gathered us to work on that. And I never understood why it was not send. I think the Ministry did not know the right channel to send it. So, they send it, but not through the right channel. So, it was not acknowledged.”

#### *Lack of coordination*

Another major concern of many respondents (including representatives from civil society organizations, international organizations and the government) was the lack of coordination at the government level. It seems unclear who has the responsibility at the government level with regard to the preparation, writing, reviewing, revising and presentation of Senegal's various periodic reports to the TMBs. The role of the different Ministries vis-à-vis other institutions (such as the Senegalese Human Rights Committee and the National Human Rights Advisory Council) is confusing and constantly changing. It seems that nobody knows exactly who is in charge. A representative of an international organization said: “There are a lot of these organizations and they are not very well coordinated.” A representative of civil society said: “They are always wondering in the governmental bodies, which is responsible for sending the reports? So, that's also one of the factors why the reports are not being sent on time. They're not sure who exactly is responsible for it. And so, there is no monitoring: “You, it's your job and you're not doing it.” That structure. We're not monitoring whose job it is and how far are they in that.” Some respondents took the latest UPR session in October 2013 as an example in order to emphasize this problem. The Ministry of Foreign Affairs (more specifically the *Direction de la Affaires Juridique and Consulaire*) led the drafting process. However, the Senegal's Minister of Justice went to Geneva and headed the delegation of Senegal. According to some representatives of international organizations, this example shows the lack of coordination between the different ministries and

<sup>135</sup> United Nations Committee on the Elimination of Discrimination Against Women, *Combined Third to Seventh Periodic Reports of Senegal*, CEDAW/C/SEN/3-7, 13 December 2013, p. 6.

between the different institutions in writing and submitting the report. However, one government representative did not agree with this argument and stated: "It's not a lack of coordination, it's group work and everybody gives advice. Everybody gives the information needed. And as a government, not all the Ministries can be represented in Geneva. There should be one leader and they chose the key Ministry to represent them, to represent the opinion of the government [the Ministry of Justice]. But it is based on the work that has been done together and it has been coordinated as a whole. So, it's not a desperate work like this, this Ministry goes this way and another the other way around. No, they coordinate and they choose a leader. And the key Minister has been chosen to represent the government there, to submit the report."

### *Lack of capacity*

Another concern put forward by representatives of civil society and international organizations (government representatives did not mention this problem) was the lack of capacity to analyze the situation. In addition, representatives of civil society and international organizations referred to a lack of human, financial and material resources as a reason why the Senegalese government is not able to properly live up to the reporting obligations.

With regard to the lack of human resources, they explained that there is often a lack of "knowledge" and "skills" on how to collect information and how to write the reports at the Ministerial level. According to these respondents, government officials who are responsible for writing the reports don't exactly know how to do it. A representative of an international organization argued: "When the capacity behind the Ministries is weak, it is quite easy to just cross your arms and say: Ok, I'm waiting and I will see what will happen." However, a representative of an international organization did not agree with this 'lack of knowledge argument.' This representative said that this is a "very weak justification" and referred to the highly educated elite in Senegal who would be "perfectly able to do this task." In addition, this representative stated that there is not a lack of capacity: "I think it's just being lazy in doing it. And which is... I mean it is not a justification or an excuse of the fact that their obligation to initial and periodical reports is not being fulfilled." With regard to the lack of financial resources, a representative of an international organization said: "There are not sufficient funds to write the report. Writing the report is not just doing research and having the good person at the right place. You also need funds to write it and review it and sometimes it is difficult to get access to these funds." Some respondents suggested that there is a need for capacity development in this regard.

In relation to the need for capacity development, many respondents (from civil society and international organizations) indicated that this problem is partially covered by the technical and financial support of the West Africa Regional Office of the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Dakar. They considered the support of the OHCHR and the civil society engagement an important factor why the third to seventh reports to the CEDAWCee and the third to fifth reports to the CRCee were submitted in 2013. A representative from an international organization said: "the OHCHR pushed the government in putting more effort in writing the report. [...] They also supported the government technically and financially."

The OHCHR made available to the Ministry of Women, Family and Children a consultant who was to support the two experts and the technical team in finalizing the drafting of the report. In addition, due to the financial support of the UNFPA and the OHCHR West Africa Regional Office, a national validation workshop was held on 19 and 20 July 2013, at Saly-Mbour, bringing together about 60 participants from parliament, sector ministries, civil society human rights organizations, non-governmental organizations and technical and financial partners.<sup>136</sup>

#### *Complex and overlapping reporting obligations*

Some respondents (representatives of international organizations and government representatives) referred to the ongoing growth of the Treaty Body System as a reason for the delay in submission periodic reports. They explained that it was challenging for the Senegalese government to meet complex and overlapping reporting obligations, bearing in mind all reporting requirements for Senegal since the government has ratified all “core” human rights treaties. They explained that the rising number of separate periodic reports, according to an uneven schedule, is demanding. In a time frame of 10 years, approximately 20 reports need to be submitted. A representative of an international organization explained: “One reason that I do believe is that those treaty bodies need to improve the way and the mechanisms that are in place to get the reports from the countries [...] there is probably a need to review and to find some other mechanism to get more compliance from countries.”

Overall, most probably a mix of all these factors will provide an answer to the question why reports are (long) overdue and remain outstanding, and those reports that have been submitted to the TMBs have been submitted late. A representative of civil society said during one of the interviews: “I expect it to be a combination of lack of political will, lack of capacity, lack of resources, lack of coordination. I think all these things mount up. In the end, I don’t think it’s any one particular thing.”

### **7.3 FGM/C in national reports and concluding observations**

Many of the TMBs have addressed FGM/C in their concluding observations on how Senegal meets the treaty obligations. It is evident that the issue of FGM/C has been discussed during sessions of the CEDAWCee and the CRCee. However, perhaps more unexpectedly, FGM/C in Senegal has also been discussed in six other Committees, namely the CERD, CESCR, HRC, CATCee, (ACmHPR) and the ACERWC.<sup>137</sup>

#### *7.3.1 National reports of Senegal*

When analyzing the national reports that Senegal submitted to the various

<sup>136</sup> United Nations Committee on the Elimination of Discrimination Against Women, *Combined Third to Seventh Periodic Reports of Senegal*, CEDAW/C/SEN/3-7, 13 December 2013, p. 6.

<sup>137</sup> FGM/C has not been discussed in the Subcommittee on Prevention of Torture, the Committee on Migrant Workers and the Committee on the Rights of Persons with Disabilities.



TMBs, it is interesting to note that almost every presentation of a report to a Committee, the Senegalese representative starts off with an allusion to Senegal's long-standing commitment to democracy and its tradition of promoting, protecting and respecting human rights.

In the many national reports that the Senegalese government submitted to the TMBs, the country reported that the ratification of international human rights instruments is matched by concrete legislative measures to provide better protection for women, including the adoption of Act No. 99-05 of 29 January 1999 criminalizing FGM/C.<sup>138</sup> The Senegalese government explained that the courts have handed down unconditional sentences in this regard<sup>139</sup> and that an assessment of the enforcement of the new legislation had been conducted in 2011.<sup>140</sup> Furthermore, the government explained in their reports that two National Action Plans supplemented the national law prohibiting FGM/C.<sup>141</sup> The Action Plan is managed by a National Council chaired by the Prime Minister and a Steering Committee composed of the various Ministries concerned and of civil society organizations operating in the sector.<sup>142</sup> The reports also reveal that former cutters were financially, materially and economically supported.<sup>143</sup> Women who performed FGM/C were being trained in income-generating activities so that they could take up alternative professions (become entrepreneurs or artisans in areas such as solar energy, craft works and small-scale gardening) to earn their living, meet the needs of their families and stand up to society pressure.<sup>144</sup>

<sup>138</sup> United Nations Committee on the Elimination of Discrimination Against Women, *Combined Third to Seventh Periodic Reports of Senegal*, CEDAW/C/SEN/3-7, 13 December 2013, p. 13, para. 32, p. 23 para. 44, p. 72; United Nations Committee on the Elimination of Racial Discrimination, *Sixteenth to Eighteenth Periodic Reports of Senegal*, CERD/C/SEN/16-18, 31 October 2011, p. 9, para. 52; United Nations Committee on the Rights of the Child, *Second Periodic Report of Senegal*, CRC/C/SEN/2, 20 February 2006, p. 25, para. 92 and p. 72; United Nations Committee Against Torture, *Summary Record of the 1109th Meeting*, CAT/C/SR.1109, 13 November 2012, p. 4-5 and p. 9, para. 26; African Commission on Human and Peoples' Rights, *Third to Seventh Periodic Reports of Senegal*, 2003, p. 14; African Commission on Human and Peoples' Rights, *Combined Periodic Reports of Senegal (2004-2013)*, April 2013, p. 36 and p. 83; African Committee of Experts on the Rights and Welfare of the Child, *Initial, First and Second Report of Senegal (1998-2009)*, 2009, p. 93-94.

<sup>139</sup> United Nations Committee on the Rights of the Child, *Second Periodic Report of Senegal*, CRC/C/SEN/2, 20 February 2006, p. 25, para. 92.

<sup>140</sup> United Nations Committee Against Torture, *Summary Record of the 1109th Meeting*, CAT/C/SR.1109, 13 November 2012, p. 4-5 and p. 9, para. 24; United Nations Committee on the Elimination of Discrimination Against Women, *Combined Third to Seventh Periodic Reports of Senegal*, CEDAW/C/SEN/3-7, 13 December 2013, p. 65, para. 140.

<sup>141</sup> United Nations Committee on the Rights of the Child, *Second Periodic Report of Senegal*, CRC/C/SEN/2, 20 February 2006, p. 21, para. 82; United Nations Committee Against Torture, *Summary Record of the 1109th Meeting*, CAT/C/SR.1109, 13 November 2012, p. 4-5 and p. 9, para. 24; United Nations Committee on the Elimination of Discrimination Against Women, *Combined Third to Seventh Periodic Reports of Senegal*, CEDAW/C/SEN/3-7, 13 December 2013, 13 December 2013, p. 81; African Commission on Human and Peoples' Rights, *Combined Periodic Reports of Senegal (2004-2013)*, April 2013, p. 36 and p. 83.

<sup>142</sup> African Commission on Human and Peoples' Rights, *Combined Periodic Reports of Senegal (2004-2013)*, April 2013, p. 36 and p. 85.

<sup>143</sup> African Committee of Experts on the Rights and Welfare of the Child, *Initial, First and Second Report of Senegal (1998-2009)*, 2009, p. 27-30.

<sup>144</sup> United Nations Committee on the Elimination of Racial Discrimination, *Sixteenth to Eighteenth Periodic Reports of Senegal*, CERD/C/SEN/16-18, 31 October 2011, p. 7, para. 35; African Commission on Human and Peoples' Rights, *Combined Periodic Reports of Senegal (2004-2013)*, April

In December 2005, Dakar hosted an inter-parliamentary Conference on “Violence against women, abandoning female genital mutilation: the role of national Parliaments” organized by the African Parliamentary Union, the Inter-Parliamentary Union and UNICEF.<sup>145</sup> In addition, the government had “acted on the recommendations of the United Nations and adopted a holistic cross-border approach to raising awareness of the problem, which also affected neighbouring countries, at various levels.”<sup>146</sup> Senegal had been sharing the lessons it had learned about FGM/C prevention with other countries in the region and organized a conference in Dakar in 2010 on FGM/C that was attended by 28 African countries.<sup>147</sup> The Senegalese government organized also “Several Islamic conferences with Egyptian theological experts, on Islam and children’s rights and, in particular, Islam and excision”<sup>148</sup> in order to sensitize on and involvement of *marabouts*,<sup>149</sup> priests and other religious guides and public figures including traditional leaders in the promotion of the rights of the child, girl and boy alike, with focus on FGM/C.<sup>150</sup>

The Senegalese government is in their National Reports very optimistic about the progress made in the past two decades and the decline in the practice at the national level. According to the reports, “significant progress”<sup>151</sup> and “giant steps”<sup>152</sup> were made in combating FGM/C in Senegal. The Senegalese government even wrote: “there is a groundswell towards public renunciation of female genital mutilation [...] making Senegal become a model country at the international level.”<sup>153</sup> They even reported the expectation that, by 2015, the deadline for the Millennium Development Goals, “total eradication of excision would have been achieved. A worse case scenario will be the continued existence of very negligible pockets of resistance to changing the practice.”<sup>154</sup> The Senegalese government explained that this decline is “a result of the

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2013, p. 36 and p. 85; United Nations Committee Against Torture, *Summary Record of the 1109th Meeting*, CAT/C/SR.1109, 13 November 2012, p. 4-5 and p. 9, para. 25.

<sup>145</sup> United Nations Committee on the Rights of the Child, *Written Replies by the Government of Senegal to the List of Issues Relating to the Consideration of the Second Periodic Report of Senegal*, CRC/C/SEN/Q/2/Add.1, 10 August 2006, p. 20.

<sup>146</sup> United Nations Committee Against Torture, *Summary Record of the 1109th Meeting*, CAT/C/SR.1109, 13 November 2012, p. 4-5 and p. 9, para. 24.

<sup>147</sup> *Ibid.*, p. 4-5 and p. 9, para. 24-26 and para. 69.

<sup>148</sup> United Nations Committee on the Rights of the Child, *Written Replies by the Government of Senegal to the List of Issues Relating to the Consideration of the Second Periodic Report of Senegal*, CRC/C/SEN/Q/2/Add.1, 10 August 2006, p. 26.

<sup>149</sup> A *Marabout* is a Muslim religious leader and teacher in West Africa, and (historically) in the Maghreb. The *Marabout* is often a scholar of the Qur’an and a religious teacher.

<sup>150</sup> African Committee of Experts on the Rights and Welfare of the Child, *Initial, First and Second Report of Senegal (1998-2009)*, 2009, p. 42.

<sup>151</sup> United Nations Committee Against Torture, *Summary Record of the 1109th Meeting*, CAT/C/SR.1109, 13 November 2012, p. 9, para. 69; United Nations Committee on the Rights of the Child, *Written Replies by the Government of Senegal to the List of Issues Relating to the Consideration of the Second Periodic Report of Senegal*, CRC/C/SEN/Q/2/Add.1, 10 August 2006, p. 22.

<sup>152</sup> African Committee of Experts on the Rights and Welfare of the Child, *Initial, First and Second Report of Senegal (1998-2009)*, 2009, p. 27.

<sup>153</sup> United Nations Committee on the Rights of the Child, *Written Replies by the Government of Senegal to the List of Issues Relating to the Consideration of the Second Periodic Report of Senegal*, CRC/C/SEN/Q/2/Add.1, 10 August 2006, p. 20.

<sup>154</sup> African Committee of Experts on the Rights and Welfare of the Child, *Initial, First and Second Report of Senegal (1998-2009)*, 2009, p. 27.

mobilization of women's groups, NGOs, development partners and the Government to conduct awareness-raising, research and advocacy activities."<sup>155</sup> In 2013, the Senegalese government reported to the African Commission on Human and Peoples' Rights that "between 2009 and 2011, 4452 communities out of 5000 surveyed in 1997 abandoned FGM/C as a result of the impact of the Community Capacity Building Programme based on a strategy of education on the rights of the individual spearheaded by civil society and supported by UNICEF, which programme helped to promote awareness among the population."<sup>156</sup> The report further stated, "These results were so encouraging that donors (UNICEF-UNFPA-USAID) decided to support a National Action Plan launched in February 2010 to fast-track the elimination of excision (2010-2015)."<sup>157</sup>

At the same time, Senegal warns in its report that this achievement should not result in "relaxation of efforts", because there is still strong resistance, especially in Fouta, Kédougou, Casamance and elsewhere, and that FGM/C "continues to be practiced clandestinely even in Grand Yoff, a densely populated district of Dakar with rudiments thereof in Mbour."<sup>158</sup> Outreach and awareness-raising programmes continue to be implemented in order to change the behaviour of communities in areas resistant to change.<sup>159</sup> In the high-prevalence zones, the Senegalese government established technical monitoring committees in order to continue to communicate with the people concerned and try to modify their behaviour.<sup>160</sup>

### 7.3.2 Concluding observations of Treaty Monitoring Bodies

The practice of FGM/C was for the first time discussed in the CEDAWCee in 1988. Although the practice was not mentioned in the initial report of Senegal, the Committee requested during the proceedings further information on "traditions and practices regarding mothers and children in general, on measures taken to eliminate old sex-stereotyped traditions and practices and on obstacles to overcoming them."<sup>161</sup> The CEDAWCee further asked the Senegalese government which steps were being taken to intensify and modify discriminatory customs and practices in connection with [...] female circumcision and patriarchal attitudes and whether any education or guidance programmes existed to eliminate family stereotypes."<sup>162</sup> The representative of

<sup>155</sup> United Nations Committee on the Elimination of Discrimination Against Women, *Combined Third to Seventh Periodic Reports of Senegal*, CEDAW/C/SEN/3-7, 13 December 2013, p. 61, para. 127.

<sup>156</sup> African Commission on Human and Peoples' Rights, *Combined Periodic Reports of Senegal (2004-2013)*, April 2013, p. 36 and p. 85.

<sup>157</sup> *Ibid.*

<sup>158</sup> United Nations Committee Against Torture, *Summary Record of the 1109th Meeting*, CAT/C/SR.1109, 13 November 2012, p. 4-5 and p. 9, para. 24-26 and para. 69; African Committee of Experts on the Rights and Welfare of the Child, *Initial, First and Second Report of Senegal (1998-2009)*, 2009, p. 27.

<sup>159</sup> United Nations Committee on the Elimination of Discrimination Against Women, *Combined Third to Seventh Periodic Reports of Senegal*, CEDAW/C/SEN/3-7, 13 December 2013, p. 23, para. 46.

<sup>160</sup> United Nations Committee Against Torture, *Summary Record of the 1109th Meeting*, CAT/C/SR.1109, 13 November 2012, p. 4-5 and p. 9, para. 24-26 and para. 69.

<sup>161</sup> United Nations Committee on the Elimination of Discrimination Against Women, *Concluding Observations, Senegal*, Suppl. No. 38 (A/43/38), 2 March 1988, p. 3, para. 566.

<sup>162</sup> *Ibid.*, p. 3, para. 567.

the Senegalese government responded that “the Government and women’s groups were conscious of its detrimental effects on women’s health and a growing number of women were fighting against it.”<sup>163</sup> The representative of the Senegalese State also said that there was no justification for the practice and that African Governments undertook many efforts to make it disappear, in particular through education of the population and training of medical personnel.<sup>164</sup>

#### *Concerns of Treaty Monitoring Bodies*

Many TMBs expressed in their concluding observations also their concern about the persistence of FGM/C in Senegal. A principal subject of concern of the CEDAWCee was that despite the efforts of the Government to guarantee equal rights for women, certain discriminatory practices persisted, including FGM/C, which “gravely offended the dignity of women.”<sup>165</sup> Although the CATCee noted the measures taken by Senegal to combat all forms of violence against women, the Committee remained deeply concerned about the persistence of FGM/C in Senegal.<sup>166</sup> The HRC also noted “the persistence of certain customs and the existence of outmoded legislation, hinder Senegal’s full compliance with its obligations under the Covenant”<sup>167</sup> and regretted that “certain traditional cultural attitudes with respect to women are not compatible with their dignity as human beings.”<sup>168</sup> Further more, the HRC stated that it “continues to be especially disturbed at the persistent custom of female genital mutilation, which violates articles 6 and 7 of the Covenant, and the high rate of maternal mortality which results from that practice.”<sup>169</sup> The CESCR noted that the persistence of certain traditions, customs and cultural practices in Senegal continue to impede the full enjoyment by women and girls of their rights under the ICESCR.<sup>170</sup> The Committee was also concerned that “significantly lower literacy rates for women as well as certain cultural practices seriously compromise their opportunities for employment and advancement.”<sup>171</sup> The CRCee was concerned that “some traditional cultural attitudes towards children may hamper the full enjoyment of the rights embodied in the Convention by children in Senegal. An understanding of children as subjects of

<sup>163</sup> United Nations Committee on the Elimination of Discrimination Against Women, *Concluding Observations, Senegal*, Suppl. No. 38 (A/43/38), 2 March 1988, p. 8, para. 605.

<sup>164</sup> *Ibid.*, p. 9, para. 609.

<sup>165</sup> United Nations Committee on the Elimination of Discrimination Against Women, *Concluding Observations, Senegal*, A/49/38(SUPP) para. 666-728, 12 April 1994, p. 127, para. 721.

<sup>166</sup> United Nations Committee Against Torture, *Concluding Observations, Senegal*, CAT/C/SEN/CO/3, 17 January 2013, p. 5, para. 14.

<sup>167</sup> United Nations Human Rights Committee, *Concluding Observations, Senegal*, CCPR/C/79/Add.10, 28 December 1992, p. 2, para. 4.

<sup>168</sup> United Nations Human Rights Committee, *Concluding Observations, Senegal*, CCPR/C/79/Add.82, 19 November 1997, p. 3, para. 12.

<sup>169</sup> *Ibid.*

<sup>170</sup> United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations, Senegal*, E/C.12/1/Add.62, 24 September 2001, p. 2, para. 11.

<sup>171</sup> United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations, Senegal*, E/C.12/1993/18, 5 January 1994, p. 2, para. 6.

rights has not yet penetrated all strata of Senegalese society.”<sup>172</sup> The CRCee remained concerned by the continuous impact of traditional and customary attitudes and the persistence of practices harmful to girls, including FGM/C, which hamper the implementation of the Convention.<sup>173</sup>

#### *Recommendations of Treaty Monitoring Bodies*

The TMBs made several recommendations to the Senegalese government in relation to the practice of FGM/C in their concluding observations. In 1997, before the national law that criminalizes FGM/C was adopted, the HRC recommended that judges and lawyers “make use of ordinary criminal law provisions to deal with instances of female genital mutilation until a specific law for this offence, the adoption of which the Committee strongly supports, is enacted.”<sup>174</sup> The CRCee recommended that Senegal should ensure that national legislation conforms fully to the provisions and principles of the Convention of the Rights of the Child and that “specific provisions should be included with a view to clearly forbidding female genital mutilation.”<sup>175</sup> In addition, the CRCee recommends that adequate legislative and other measures should also be taken to establish a complaints procedure for children whose fundamental rights have been violated.<sup>176</sup> The HRC encouraged the State Party in 1997 to “launch a systematic campaign to promote popular awareness of persistent negative attitudes towards women and to protect them against all forms of discrimination; it urges the State Party to abolish practices prejudicial to women’s health and to reduce maternal mortality.”<sup>177</sup> The CEDAWCee encouraged Senegal in 1994 to “step up its public information campaigns on behalf of women and to expand its programmes to combat traditional practices which affect women’s health and advancement in order to eliminate persistent forms of discrimination against women.”<sup>178</sup> In 2001, the CESCR was concerned that FGM/C was still practiced with impunity,<sup>179</sup> despite the existence of legislation banning FGM/C, and urged Senegal to enforce the existing legislation against FGM/C.<sup>180</sup> The CATCee recommended Senegal in 2013 to continue to publicize Act No. 99-05 of 29 January 1999 on the penalization of FGM/C and to run awareness and information campaigns for the general

<sup>172</sup> United Nations Committee on the Rights of the Child, *Concluding Observations, Senegal*, CRC/C/15/Add.44, 27 November 1995, p. 2, para. 8.

<sup>173</sup> United Nations Committee on the Rights of the Child, *Concluding Observations, Senegal*, CRC/C/SEN/CO/2, 20 October 2006, p. 3, para. 7 and p. 11, para. 50.

<sup>174</sup> United Nations Human Rights Committee, *Concluding Observations, Senegal*, CCPR/C/79/Add.82, 19 November 1997, p. 3, para. 12.

<sup>175</sup> United Nations Committee on the Rights of the Child, *Concluding Observations, Senegal*, CRC/C/15/Add.44, 27 November 1995, p. 4, para. 24.

<sup>176</sup> United Nations Human Rights Committee on the Rights of the Child, *Concluding Observations, Senegal*, CRC/C/15/Add.44, 27 November 1995, para. 24.

<sup>177</sup> United Nations Human Rights Committee, *Concluding Observations, Senegal*, CCPR/C/79/Add.82, 19 November 1997, p. 3, para. 12.

<sup>178</sup> United Nations Committee on the Elimination of Discrimination Against Women, *Concluding Observations, Senegal*, A/49/38(SUPP) para. 666-728, 12 April 1994, p. 127, para. 725.

<sup>179</sup> United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations, Senegal*, E/C.12/1/Add.62, 24 September 2001, p. 4, para. 24.

<sup>180</sup> *Ibid.*, p. 5, para. 39.

public and law-enforcement officers.<sup>181</sup> According to the CATCee, the State Party should investigate all allegations of such violence, prosecute and punish the perpetrators and offer victims effective protection and immediate redress.<sup>182</sup> The CATCee also recommended Senegal to “Ensure that the programme to combat gender violence and to promote human rights, and the related national action plan, include access to shelter, medical and psychological assistance, and reintegration programmes. The State Party should provide further information on this programme and on the implementation of the second national action plan to hasten the end of the practice of excision (2010–2015).”<sup>183</sup> The CRCee encouraged the Government to “pursue its efforts aiming at promoting advocacy and awareness and understanding of the Convention and having its basic principles grasped by the general public, in particular by ensuring the translation of the Convention in all national languages and paying particular attention to people living in rural areas. The Government should pursue such efforts in close cooperation with community and religious leaders, with a view to promoting change in persisting negative attitudes towards children, particularly girls, and to abolishing practices prejudicial to the health of children, in particular female genital mutilations.”<sup>184</sup> More concretely, the CRCee recommended Senegal to (a) continue with awareness-raising campaigns to combat and eradicate FGM/C; (b) to introduce education and awareness-raising programmes for practitioners and the general public to encourage change in traditional attitudes and discourage harmful practices, engaging with the extended family and the traditional and religious leaders and support practitioners of female genital mutilation to find alternative sources of income; and (c) to ensure the implementation of the Law No. 99-05 regarding the prohibition of FGM/C and ensure that perpetrators are brought to justice.<sup>185</sup>

#### *Compliments of Treaty Monitoring Bodies*

Senegal has also been commended by the TMBs for its efforts in the fight against FGM/C. The CERD noted with satisfaction Senegal’s efforts in “the banning of genital mutilation”<sup>186</sup> and welcomed “the encouraging results of various measures taken by the State Party to eradicate female genital mutilation.”<sup>187</sup> The CESCR noted with appreciation the enactment of the law of January 1999 that criminalizes FGM/C.<sup>188</sup> The CATCee welcomed “the second national action plan to hasten the end of the practice of excision (2010–2015),

<sup>181</sup> United Nations Committee Against Torture, *Concluding Observations, Senegal*, CAT/C/SEN/CO/3, 17 January 2013, p. 5, para. 14.

<sup>182</sup> *Ibid.*

<sup>183</sup> *Ibid.*

<sup>184</sup> United Nations Committee on the Rights of the Child, *Concluding Observations, Senegal*, CRC/C/15/Add.44, 27 November 1995, p. 3, para. 18.

<sup>185</sup> United Nations Committee on the Rights of the Child, *Concluding Observations, Senegal*, CRC/C/SEN/CO/2, 20 October 2006, p. 11, para. 51.

<sup>186</sup> United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations, Senegal*, A/57/18 (para. 435–450), 1 January 2002, p. 72, para. 440.

<sup>187</sup> United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations, Senegal*, CERD/C/SEN/CO/16-18, 24 October 2012, p. 2, para. 8.

<sup>188</sup> United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations, Senegal*, E/C.12/1/Add.62, 24 September 2001, p. 2, para. 6.

approved and launched in February 2010.”<sup>189</sup> The CRCEe took notes of the progress made by Senegal in the effort to bring domestic law into compliance with the Convention.<sup>190</sup> The CEDAWCee and CRCEe welcomed the in enactment of Law No. 99-05 of 1999 prohibiting FGM/C<sup>191</sup> and noted with appreciation the efforts made by Senegal in combating FGM/C.<sup>192</sup>

## 8 UNIVERSAL PERIODIC REVIEW

This section examines the cooperation of Senegal with the Universal Periodic Review (UPR). First, a short introduction is given on the UPR mechanism and process. Afterwards, an analysis is provided of the two periodic reviews of the human rights record of Senegal that took place relatively in 2009 and 2013 with a specific focus on the comments, recommendations, concerns and questions of UN Member States in relation to FGM/C in Senegal.

### 8.1 Introduction to the Universal Periodic Review

The UN General Assembly created the Universal Periodic Review (UPR) on 15 March 2006 in Resolution 60/251.<sup>193</sup> The UPR is a UN mechanism that involves a periodic review of the human rights records of all UN Member States. It is an inter-State review process under the support of the Human Rights Council. It provides the opportunity for each State to declare what actions they have taken to improve the human rights situation in their countries and to overcome challenges to the enjoyment of human rights.<sup>194</sup> The UPR also includes a sharing of best practices among States. The ultimate aim of the UPR mechanism is to improve the human rights situation in all countries and address human rights violations wherever they occur. According to UN Secretary-General Ban Ki-moon, the UPR mechanism “has great potential to promote and protect human rights in the darkest corners of the world.”<sup>195</sup> The reviews are conducted by the UPR Working Group, which consists of the 47 members of the Human Rights Council. The reviews are based on three key documents (i) a national report (information provided by the State under review); (ii) a compilation prepared by the OHCHR (information contained in the reports of UN TMBs, Special Procedures, including observations and comments by the State concerned, and

<sup>189</sup> United Nations Committee Against Torture, *Concluding Observations, Senegal*, CAT/C/SEN/CO/3, 17 January 2013, p. 2, para. 7(c).

<sup>190</sup> United Nations Committee on the Rights of the Child, *Concluding Observations, Senegal*, CRC/C/SEN/CO/2, 20 October 2006, p. 3, para. 7.

<sup>191</sup> Ibid, p. 1, para. 3; United Nations Committee on the Elimination of Discrimination Against Women, *Concluding Observations, Senegal*, CEDAW/C/SEN/CO/3-7, 28 July 2015, p. 5, para. 18.

<sup>192</sup> United Nations Committee on the Rights of the Child, *Concluding Observations, Senegal*, CRC/C/SEN/CO/2, 20 October 2006, para. 50.

<sup>193</sup> United Nations General Assembly, *Resolution 60/251 on Human Rights Council*, A/RES/60/251, 3 April 2006.

<sup>194</sup> See the website of the Office of the High Commissioner for Human Rights, *Basic Facts about the UPR*, available at <http://www.ohchr.org/en/hrbodies/upr/pages/BasicFacts.aspx> [Last Accessed 1 October 2015].

<sup>195</sup> Opening of the Fourth Session of the Human Rights Council, Geneva, Switzerland, 12 March 2007. See the website of the United Nations, *Secretary General Ban Ki-Moon, Latest Statements*, available at <http://www.un.org/sg/statements/?nid=2475> [Last Accessed 1 October 2015].

other relevant official UN documents); (iii) a summary prepared by the OHCHR (information submitted by other relevant stakeholders, such as NGOs, NHRIs, human rights defenders, academic institutions and research institutes, regional organizations, as well as civil society representatives).<sup>196</sup> The reviews take place during a meeting of the UPR Working Group through an interactive dialogue between the State under review and other UN Member States. During the dialogue, UN Member States can make recommendations or comments, raise their concerns and pose questions to the States under review to address specific human rights challenges. The results of each review are reflected in an “outcome report”. By October 2011, the human rights records of all 193 UN Member States had been reviewed. The human rights situation of Senegal was examined for the first time in February 2009 and for the second time in October 2013. The next review of Senegal will be in April 2018.

## 8.2 First Review in February 2009

The UPR Working Group reviewed Senegal for the first time on 6 February 2009. Although the National Report of Senegal did not contain any information on FGM/C,<sup>197</sup> during the interactive dialogue several UN Member States made comments/recommendations, raised concerns and posed questions in relation to FGM/C.

### 8.2.1 Positive comments by UN Member States

Positive achievements were noted by the delegations of Ireland and Botswana. Ireland welcomed the good progress underway in Senegal on women’s rights, including the adoption of legislation eliminating discrimination against women and protecting women against FGM/C.<sup>198</sup> Botswana recommended that the government of Senegal continues its positive efforts towards implementation of relevant legislation pertaining to, inter alia, the prohibition of certain cultural practices adjudged harmful.<sup>199</sup>

### 8.2.2 Concerns and recommendations of UN Member States

Several UN Member States (including Ireland,<sup>200</sup> Luxembourg,<sup>201</sup> Switzerland)<sup>202</sup> expressed their concern that legislation was not always translated into concrete

<sup>196</sup> See the website of the Office of the High Commissioner for Human Rights, *UPR Documentation*, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx> [Last Accessed 1 October 2015].

<sup>197</sup> United Nations General Assembly, *National Report of Senegal*, Human Rights Council, A/HRC/11/24, 5 October 2009.

<sup>198</sup> Advance Questions to Senegal – Addendum, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/SNQuestions.aspx> [Last Accessed 1 October 2015].

<sup>199</sup> United Nations General Assembly, *National Report of Senegal*, Human Rights Council, A/HRC/11/24, 5 October 2009, para. 71.

<sup>200</sup> Advance Questions to Senegal – Addendum, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/SNQuestions.aspx> [Last Accessed 1 October 2015].

<sup>201</sup> United Nations General Assembly, *National Report of Senegal*, Human Rights Council, A/HRC/11/24, 5 October 2009, para. 39.

<sup>202</sup> *Ibid*, para. 31(c).



results for women and girls. They noted that FGM/C remains common in Senegal<sup>203</sup> and recommended Senegal to enforce or implement more effectively the provisions of law 99-05 prohibiting FGM/C. Palestine<sup>204</sup> and Ghana<sup>205</sup> recommended Senegal to pursue and increase efforts at eliminating all forms of discrimination against women, including adopting effective measures to implement existing legislation on this subject. Canada noted that VAW continues, despite the legislation punishing it.<sup>206</sup> Canada therefore recommended that Senegal takes measures to raise awareness among the public and all players involved in the judicial system regarding the need to respect and apply this legislation.<sup>207</sup> Further more, some countries (including Switzerland,<sup>208</sup> Ireland,<sup>209</sup> South Africa,<sup>210</sup> Luxembourg,<sup>211</sup> United Kingdom<sup>212</sup> and the United States<sup>213</sup>) recommended undertaking and/or continue an effective national awareness-raising campaign to prevent, combat and eradicate FGM/C. According to Luxembourg, these awareness-raising campaigns seek to bring about positive trends in traditional behaviour.<sup>214</sup> Ireland, Switzerland, the UK, Luxembourg and the United States of America encouraged Senegal to undertake an awareness-raising campaign to prevent and eradicate FGM/C and other traditional harmful practices against women and girls.<sup>215</sup> Senegal accepted all these recommendations.<sup>216</sup>

### 8.2.3 Questions of UN Member States

Apart from these recommendations, several questions and issues were raised in relation to FGM/C. Romania<sup>217</sup> and France<sup>218</sup> asked for example how Senegal intends to combat discrimination against women, including FGM/C. Ireland

<sup>203</sup> Advance Questions to Senegal – Addendum, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/SNQuestions.aspx> [Last Accessed 1 October 2015].

<sup>204</sup> United Nations General Assembly, *National Report of Senegal*, Human Rights Council, A/HRC/11/24, 5 October 2009, para. 97(6).

<sup>205</sup> *Ibid.*, para. 44.

<sup>206</sup> *Ibid.*, para. 63.

<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid.*, para. 31(c).

<sup>209</sup> Advance Questions to Senegal – Addendum, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/SNQuestions.aspx> [Last Accessed 1 October 2015].

<sup>210</sup> United Nations General Assembly, *National Report of Senegal*, Human Rights Council, A/HRC/11/24, 5 October 2009, para. 91.

<sup>211</sup> *Ibid.*, para. 39.

<sup>212</sup> *Ibid.*, para. 35.

<sup>213</sup> United Nations General Assembly, *Report of the Human Rights Council on its Eleventh Session*, A/HRC/11/37, 16 October 2009, para. 498.

<sup>214</sup> United Nations General Assembly, *National Report of Senegal*, Human Rights Council, A/HRC/11/24, 5 October 2009, para. 39.

<sup>215</sup> *Ibid.*, para. 31(c), para. 79, para. 35 and para. 39; United Nations General Assembly, *Report of the Human Rights Council on its Eleventh Session*, A/HRC/11/37, 16 October 2009, para. 498.

<sup>216</sup> UPR Responses to Recommendations, Senegal, Review in the Working Group, 6 February 2009, p. 1, available at [http://www.upr-info.org/sites/default/files/document/senegal/session\\_4\\_-\\_february\\_2009/recommendationstosenegal2009.pdf](http://www.upr-info.org/sites/default/files/document/senegal/session_4_-_february_2009/recommendationstosenegal2009.pdf) [Last Accessed 1 October 2015].

<sup>217</sup> *Ibid.*, para. 88.

<sup>218</sup> United Nations General Assembly, *National Report of Senegal*, Human Rights Council, A/HRC/11/24, 5 October 2009, para. 33.

asked what activities the government is undertaking with regard to the effective enforcement of law 99-05 prohibiting FGM/C and if there are any plans proposed which would seek to raise public awareness about the practice.<sup>219</sup> Germany asked which concrete legislative and other measures the Senegalese Government envisages fighting and eradicating harmful practices. In their response, the Senegalese delegation stated that the eradication of FGM/C is a priority, with severe penalties in place and expanded awareness-raising efforts in villages.<sup>220</sup> In the Addendum of the Report of the Working Group on the UPR, in which views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review are compiled, one can read that the Senegalese delegation also stated that: "With regard to female genital mutilation, sustained efforts at awareness-raising, training and support among the general public have resulted in abandonment of the practice of excision in 75 per cent of Senegal's 5,000 communities. Increasingly, those who refuse to comply are prosecuted and punished. By Decree No. 10545 of 10 December 2008, the Minister of Justice established a committee to look into violence against women and children."<sup>221</sup>

#### 8.2.4 Concluding remarks

Ireland thanked the delegation of Senegal for the constructive way in which it had participated in the universal periodic review process and it noted with appreciation that "Senegal had accepted its recommendation concerning the need for an awareness-raising campaign on the application of the law on female genital mutilation."<sup>222</sup> Senegal also made a concluding remark regarding FGM/C and stated: "Concerning female genital mutilation, some individuals had recently been sentenced in that regard despite public opposition, in addition to sensitization activities. This should be seen in relation to other activities related to the protection of women and to child education."<sup>223</sup>

### 8.3 Second review in October 2013

The UPR Working Group reviewed Senegal for the second time on 21 October 2013. During this session, there was a lot of attention for FGM/C. In contrast to the first round, the National Report of Senegal included information in relation to FGM/C. Not surprisingly, many UN Member States made comments/recommendations, raised concerns and posed questions in relation to FGM/C during the interactive dialogue.

<sup>219</sup> Advance Questions to Senegal – Addendum, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/SNQuestions.aspx> [Last Accessed 1 October 2015].

<sup>220</sup> United Nations General Assembly, *National Report of Senegal*, Human Rights Council, A/HRC/11/24, 5 October 2009, para. 95.

<sup>221</sup> United Nations General Assembly, *National Report of Senegal, Addendum*, Human Rights Council, A/HRC/11/24/Add.1, 8 June 2009, p. 3.

<sup>222</sup> United Nations General Assembly, *Report of the Human Rights Council on its Eleventh Session*, A/HRC/11/37, 16 October 2009, para. 499.

<sup>223</sup> *Ibid*, para. 511.

### 8.3.1 FGM/C in national report Senegal<sup>224</sup>

In their national report, Senegal specifically replied to the recommendations in relation to FGM/C of UN Member States that they accepted during the interactive dialogue in the first round in February 2009. In relation to the implementation and more effective application of Act No. 99-05 criminalizing FGM/C, Senegal explained that it has introduced harsher penalties for FGM/C by means of Act No. 1999-05 of 29 January 1999.<sup>225</sup> They wrote in their report that as far as VAW is concerned, FGM/C is among the “most severely penalized offences.”<sup>226</sup> The Government also wrote in their National Report that they encouraged citizens to report FGM/C cases. Article 32 of the Code of Criminal Procedure provides that officials must inform the judicial authority if, during the performance of their duties, they become aware of criminal acts. Citizens and groups of individuals have the right to avail themselves of legal remedies to protect their rights and freedoms. In such cases, the courts rigorously apply the laws designed to eliminate all forms of violence against women.<sup>227</sup> The Government had also commissioned a study in 2010 to evaluate the implementation status of Act No. 1999-05. This study “highlighted the need for a new plan to hasten the end of female genital mutilation and generate awareness among the communities still practising it, with a view to totally eradicating it by 2015.”<sup>228</sup> Senegal also reported that the second NAP to eliminate FGM/C provided for the establishment of a National Council, chaired by the Prime Minister, and a steering committee. Twelve monitoring committees were set up in 2011 in areas of high prevalence, chaired by regional governors, in areas of high prevalence.<sup>229</sup> A human rights capacity-strengthening programme was designed to help them improve the effectiveness of their interventions. Similarly, women who perform excisions have been encouraged to perform other lines of business<sup>230</sup> and an empowerment programme has been established for them.<sup>231</sup> In relation to undertaking measures to raise awareness to eliminate FGM/C, Senegal reported that awareness-raising campaigns on the consequences of FGM/C were run in the media and other campaigns have targeted religious and social leaders. Legal advice centres use television programmes to inform the most vulnerable populations of their rights, while NGOs and women’s associations use law shops to guide and assist women victims of violence with administrative, judicial, psychological, and social and health formalities, using various mechanisms and strategies.<sup>232</sup> In 2012, a joint programme to combat gender-based violence and promote human rights was adopted.<sup>233</sup> Overall, Senegal

<sup>224</sup> United Nations General Assembly, *National Report of Senegal*, Human Rights Council, A/HRC/WG.6/17/SEN/1, 23 July 2013, para. 23-27.

<sup>225</sup> *Ibid.*, para. 46.

<sup>226</sup> *Ibid.*, para. 111.

<sup>227</sup> *Ibid.*, para. 26.

<sup>228</sup> *Ibid.*, para. 24.

<sup>229</sup> *Ibid.*, para. 56.

<sup>230</sup> *Ibid.*, para. 25 and 56.

<sup>231</sup> *Ibid.*, para. 56.

<sup>232</sup> *Ibid.* para. 27.

<sup>233</sup> *Ibid.*, para. 24.

explained that “significant results have been achieved”<sup>234</sup> and that trends show a marked decrease of FGM/C in the country “with thousands of communities having publicly renounced it.”<sup>235</sup> According to the National Report, data from the Demographic and Health Survey and Multiple Indicator Cluster Survey for 2010–2011 revealed “a 25.7 per cent reduction in the national female genital mutilation prevalence rate.”<sup>236</sup>

### 8.3.2 Positive comments by UN Member States

Positive achievements were noted by many delegations: Australia,<sup>237</sup> Argentina,<sup>238</sup> Bangladesh,<sup>239</sup> Benin,<sup>240</sup> Burkina Faso,<sup>241</sup> Cote d’Ivoire,<sup>242</sup> Ecuador,<sup>243</sup> Germany,<sup>244</sup> Maldives,<sup>245</sup> The Netherlands,<sup>246</sup> Philippines,<sup>247</sup> South Sudan<sup>248</sup> and Vietnam.<sup>249</sup> They welcomed the efforts and determination of Senegal towards the elimination of FGM/C. These delegations noted with satisfaction the steps and measures that had been taken to combat FGM/C and the progress made so far.<sup>250</sup> More specifically, South Sudan commended the establishment of institutional frameworks strengthening human rights and noted the progress in implementing recommendations from the previous UPR.<sup>251</sup> Madagascar commended Senegal for combating FGM/C through strengthened awareness campaigns and legislation against FGM/C.<sup>252</sup> Burkina Faso welcomed the ongoing commitment of Senegal to creating a human rights culture.<sup>253</sup> China welcomed the implementation of recommendations accepted during the previous review on the reduction of FGM/C and health development.<sup>254</sup> Uruguay commended legislation on outlawing FGM/C<sup>255</sup> and Cape Verde commended the adoption of the second National Action Plan on FGM/C.<sup>256</sup>

<sup>234</sup> United Nations General Assembly, *National Report of Senegal*, Human Rights Council, A/HRC/WG.6/17/SEN/1, 23 July 2013, para. 24.

<sup>235</sup> Ibid, para. 23.

<sup>236</sup> Ibid, para. 24.

<sup>237</sup> United Nations General Assembly, *Report of the Working Group on the Universal Periodic Review on Senegal*, A/HRC/25/4, 11 December 2013, para. 30.

<sup>238</sup> Ibid, para. 29.

<sup>239</sup> Ibid, para. 33.

<sup>240</sup> Ibid, para. 35.

<sup>241</sup> Ibid, para. 38.

<sup>242</sup> Ibid, para. 48.

<sup>243</sup> Ibid, para. 52.

<sup>244</sup> Ibid, para. 64.

<sup>245</sup> Ibid, para. 77.

<sup>246</sup> Ibid, para. 84.

<sup>247</sup> Ibid, para. 92.

<sup>248</sup> Ibid, para. 109.

<sup>249</sup> Ibid, para. 24.

<sup>250</sup> Ibid, para. 96.

<sup>251</sup> Ibid, para. 109.

<sup>252</sup> Ibid, para. 75.

<sup>253</sup> Ibid, para. 38.

<sup>254</sup> Ibid, para. 44.

<sup>255</sup> Ibid, para. 22.

<sup>256</sup> Ibid, para. 41.

### 8.3.3 Concerns and recommendations of UN Member States

States participating in the dialogue had a series of recommendations to Senegal in relation to FGM/C. In general, Côte d'Ivoire recommended Senegal to strengthen actions against harmful cultural practices.<sup>257</sup> Argentina and Ecuador recommended Senegal to continue its efforts to eradicate FGM/C.<sup>258</sup> Brazil recommended Senegal to maintain and reinforce all measures aimed at eradicating FGM/C, "which is often related to other forms of aggression against women."<sup>259</sup> In relation to legislative efforts of Senegal, the Netherlands noted that FGM/C often remained unpunished.<sup>260</sup> Burkina Faso recommended Senegal to prosecute and punish persons who, despite awareness campaigns, continue to be perpetrators or accomplices of FGM/C, according to the law of 22 January 1999.<sup>261</sup> Cape Verde encouraged the continued implementation of existing instruments and policies to ensure sustainable solutions.<sup>262</sup> In relation to policymaking, Paraguay recommended Senegal to continue to strengthen all public policies with a view to eliminating FGM/C.<sup>263</sup> Algeria recommended Senegal to continue its efforts to achieve the goals of the second NAP to eliminate FGM/C.<sup>264</sup> Angola recommended Senegal to continue, in the framework of the fight against FGM/C, its action in the implementation of the second NAP for accelerating the abandonment of FGM/C until 2015.<sup>265</sup> Rwanda recommended Senegal to continue its positive engagement toward the total eradication of FGM/C by 2015 as indicated in the NAP.<sup>266</sup> In relation to awareness-raising, Burkina Faso urged efforts to raise awareness and share information on FGM/C.<sup>267</sup> Gabon recommended Senegal to continue its efforts to increase awareness and repression of all forms of violence against women, particularly FGM/C.<sup>268</sup> Cote d'Ivoire<sup>269</sup> and Benin<sup>270</sup> called on the international community to provide further support. All recommendations have been accepted by the Senegalese delegation.<sup>271</sup>

### 8.3.4 Questions of UN Member States

The United Kingdom submitted the following question in advance: "What is Senegal doing to ensure that programmes on gender violence and the elimination of female genital mutilation also include access to medical facilities,

<sup>257</sup> United Nations General Assembly, *Report of the Working Group on the Universal Periodic Review on Senegal*, A/HRC/25/4, 11 December 2013, para. 124.45.

<sup>258</sup> *Ibid.*, para. 124.48.

<sup>259</sup> *Ibid.*, para. 124.49.

<sup>260</sup> *Ibid.*, para. 84.

<sup>261</sup> *Ibid.*, para. 124.51.

<sup>262</sup> *Ibid.*, para. 41.

<sup>263</sup> *Ibid.*, para. 124.50.

<sup>264</sup> *Ibid.*, para. 124.46.

<sup>265</sup> *Ibid.*, para. 124.47.

<sup>266</sup> *Ibid.*, para. 124.52.

<sup>267</sup> *Ibid.*, para. 38.

<sup>268</sup> *Ibid.*, para. 124.44.

<sup>269</sup> *Ibid.*, para. 48.

<sup>270</sup> *Ibid.*, para. 35.

<sup>271</sup> UPR Recommendations and Pledges, Senegal, Second Review, Session 17, 21 October 2013, p. 1, available at [http://www.upr-info.org/sites/default/files/document/senegal/session\\_17\\_-\\_october\\_2013/recommendations\\_and\\_pledges\\_senegal\\_2014.pdf](http://www.upr-info.org/sites/default/files/document/senegal/session_17_-_october_2013/recommendations_and_pledges_senegal_2014.pdf) [Last Accessed 1 October 2015].

shelter, psychological assistance and reintegration programmes?”<sup>272</sup> Italy asked Senegal for further information on the plan to eliminate FGM/C (especially monitoring initiatives and implementation resources).<sup>273</sup> Luxembourg asked whether a monitoring mechanism had been implemented on FGM/C.<sup>274</sup> Montenegro requested more information on prosecutions brought and convictions handed down in FGM/C cases.<sup>275</sup> The delegation of Senegal explained that new multisectoral policies had been implemented to combat FGM/C other forms of violence against women and girls.<sup>276</sup>

### 8.3.5 Concluding remarks

The Senegalese delegation concluded that they had taken a three-pronged approach to combating FGM/C: “The practice was punished, awareness of it was being raised among the population, and women who performed it were offered alternative occupations so that they could stop.”<sup>277</sup> The Senegalese delegation stated that several regions had renounced the practice; “of around 5,000 communities, more than 4,500 had announced that they had abandoned excision.”<sup>278</sup> Efforts were now focused on the remaining 500 communities, using the three-pronged approach. Furthermore, the Senegalese authorities had noted the need to develop regional cooperation in order to render their approach more effective.<sup>279</sup>

## 9 NATIONAL HUMAN RIGHTS INSTITUTIONS

The Senegalese authorities have established an institutional framework consisting of several National Human Rights Institutions (NHRIs). The NHRIs are involved in the promotion and protection of human rights and deal with matters concerning the implementation of international and regional human rights law. Among them is the High Commissioner for Human Rights and the Promotion of Peace, the Senegalese Human Rights Committee, the Inter-Ministerial Committee on Human Rights and International Humanitarian Law, the National Human Rights Advisory Council and the Office of the Ombudsman. These institutions will be briefly discussed below in order to provide an overview of the Senegalese national human rights structure. However, in the context of FGM/C, the NHRIs do not play a considerable role.

### 9.1 High Commissioner for Human Rights and the Promotion of Peace

The High Commissioner for Human Rights and the Promotion of Peace (*Haut*

<sup>272</sup> Advance Questions to Senegal, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/SNSession17.aspx> [Last Accessed 1 October 2015].

<sup>273</sup> United Nations General Assembly, *Report of the Working Group on the Universal Periodic Review on Senegal*, A/HRC/25/4, 11 December 2013, para. 71.

<sup>274</sup> *Ibid.*, para. 74.

<sup>275</sup> *Ibid.*, para. 81.

<sup>276</sup> *Ibid.*, para. 7 and para. 30.

<sup>277</sup> *Ibid.*, para. 57.

<sup>278</sup> *Ibid.*

<sup>279</sup> *Ibid.*

*Commissariat aux Droits de l'Homme et à la Promotion de la Paix*) was established in June 2004 by Decree No. 2004-657. The Office of the High Commissioner is attached to the Office of the President of the Republic and is mainly responsible for monitoring all matters relating to the promotion and protection of human rights, the implementation of international humanitarian law and the development of the culture of peace.<sup>280</sup> The Office includes in the first place a human rights desk (*guichet des droits de l'homme*) that is in charge of receiving complaints from individuals, corporate bodies or from organizations working in the field of human rights and international humanitarian law. The human rights desk also makes suggestions to the President of the Republic on subsequent responses. In the second place, the Commission comprises a follow-up unit, which is in charge of following the implementation of observations and recommendations made by the Senegalese Human Rights Committee.<sup>281</sup> This unit is tasked with the coordination and preparation of national periodic reports on the human rights situation and of replies to communications and questions addressed to Senegal by regional and international bodies responsible for monitoring the situation with respect to human rights and international humanitarian law. Lastly, the Commission also includes a unit for coordinating efforts to combat human trafficking and related practices.<sup>282</sup>

## 9.2 Senegalese Human Rights Committee

The National Human Rights Commission was created by decree in April 1970 with a general mandate to promote and protect human rights.<sup>283</sup> Senegal became one of the first states to create such an institution.<sup>284</sup> The purpose of the Commission was mainly promotional to create greater human rights awareness.<sup>285</sup> It was charged with organizing the celebration of UN designated events, such as the Human Rights Day on December 10. The performance after the establishment of the Commission was variable and “influenced by political circumstances and the energies of successive directors.”<sup>286</sup> When Youssoupha Ndiaye (President of the Constitutional Court) became the new director in 1994, he actively sought to revive the Commission and proposed that the committee should be organized and established in law. Consequently a new law (Act No. 97-04) was promulgated on March 10, 1997 to establish the Senegalese Human

<sup>280</sup> Article 1 and 2 of Decree No. 2004-657 of 2 June 2004 on the Establishment, Organization and Functioning of the High Commissioner for Human Rights and the Promotion of Peace.

<sup>281</sup> Article 5 of Presidential Decree No. 5691 of 6 July 2004.

<sup>282</sup> United Nations Committee Against Torture, *Third Periodic Report of Senegal*, CAT/C/SEN/3, 5 October 2011, p. 10, para. 38.

<sup>283</sup> United Nations General Assembly, *National Report of Senegal*, Human Rights Council, A/HRC/WG.6/17/SEN/1, 23 July 2013, p. 3, para. 9.

<sup>284</sup> C.H. Heyns and F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, Martinus Nijhoff Publishers, 2002, p. 536.

<sup>285</sup> United Nations Committee on the Elimination of Racial Discrimination, *Fifteenth Periodic Report, Senegal*, CERD/C/408/Add.2, 19 November 2001, p. 12, para. 57; B. Nowrojee, *Protectors Or Pretenders? Government Human Rights Commissions in Africa*, Human Rights Watch Africa, 2001, p. 261.

<sup>286</sup> *Ibid.*

Rights Committee (*Comité Sénégalais des Droits de l'Homme - CSDH*).<sup>287</sup> This law strengthened the Committee and enlarged its functions.<sup>288</sup> The CSDH was defined to be an independent institution to promote matters of human rights through “consultation, observation, evaluation, dialogue, [and] concertation.”<sup>289</sup> The Committee consists of representatives of NGOs, the Parliament, Economic and Social Council, Supreme Courts, Bar (advocates) and the University.<sup>290</sup> Representatives of the State sit on the Committee in a consultative capacity. The main responsibility of the CSDH is to represent the various trends in public opinion on human rights in Senegal.<sup>291</sup> The main tasks of this Committee are as follows: (i) promoting human rights through information campaigns, advocacy activities and the collecting of all documentation concerning human rights;<sup>292</sup> (ii) attracting the attention of the authorities to human rights violations and, where appropriate, to propose measures to end them; (iii) monitoring implementation and observance of the human rights conventions;<sup>293</sup> (iv) issue opinions or recommendations in all matters related to human rights at the request of Government, Parliament or even on its own initiative;<sup>294</sup> (v) submit an annual report to the President on the human rights situation in Senegal. The Senegalese Human Rights Committee makes public its opinions and recommendations.

In December 2012, the CSDH lost its “A” status from the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) Sub-Committee on Accreditation (SCA) for non-compliance with the ‘Paris Principles’.<sup>295</sup> The CSDH was downgraded to “B” status (not fully in compliance with the Paris Principles), mainly because the independence of the institution was at stake. According to the Paris Principles, the national institution needs to be independent of the Government and this independence must be guaranteed either by statutory law or constitutional provisions. However, the CSDH is part of the Ministry of Justice and there is no law or constitutional provision guaranteeing the independence of the Committee. Other reasons why the SCA decided to downgrade the CSDH to “B”

<sup>287</sup> United Nations General Assembly, *National Report of Senegal*, Human Rights Council, A/HRC/WG.6/17/SEN/1, 23 July 2013, p. 3, para. 9.

<sup>288</sup> Originally, the National Human Rights Commission acted as a representative of trade unions, youth and women’s movement, see Decree No. 70-453 of 22 April 1970 establishing a Senegalese Human Rights Committee.

<sup>289</sup> B. Nowrojee, *Protectors Or Pretenders? Government Human Rights Commissions in Africa*, Human Rights Watch Africa, 2001, p. 262.

<sup>290</sup> Act No. 97/4 of 10 March 1997, Founding Act of National Human Rights Institution in Senegal, Preamble, see also <http://www.nhri.net/Ni/Files/52/SN%20Act%2097-4%20of%201997%20Senegalese%20Committee%20for%20Human%20Rights.pdf> [Last Accessed 1 October 2015].

<sup>291</sup> United Nations Committee on the Elimination of Racial Discrimination, *Fifteenth Periodic Report, Senegal*, CERD/C/408/Add.2, 19 November 2001, p. 12, para. 60.

<sup>292</sup> Act No. 97/4 of 10 March 1997, Founding Act of National Human Rights Institution in Senegal, Article 2.

<sup>293</sup> *Ibid*, Article 3.

<sup>294</sup> Act No. 97/4 of 10 March 1997, Founding Act of National Human Rights Institution in Senegal, Article 2 and preamble.

<sup>295</sup> The Paris Principles are a set of core minimum recommendations relating to the status and functioning of national institutions for the protection and promotion of human rights. The Paris Principles are set out in United Nations General Assembly, *Resolution 48/134 on National Institutions for the Promotion and Protection of Human Rights*, A/RES/48/134, 20 December 1993.



status were the funding levels of the Committee,<sup>296</sup> the procedures for nominating and appointing members,<sup>297</sup> the appointment of members on a part-time basis and the Committee's ability to choose its own members. The Senegalese authorities subsequently appointed a new Director and strengthened the Committee's capacity "to ensure it was fully operational and able to regain its former status."<sup>298</sup> Although questions were not asked during the interview about NHRI, one respondent (a representative of an international organization) referred to the decision of the SCA when answering the question about the TMB. The respondent argued: "The *Comité Sénégalais* has finally lost its A-status. It has never been in compliance with international human rights standards. The B-status or C-status is more adequate to what they do. [...] It was actually a big fraud that the *Comité Sénégalais* was classified for the past ten years as an A-status."

### 9.3 Inter-Ministerial Committee on Human Rights and International Humanitarian Law

The Inter-Ministerial Committee on Human Rights and International Humanitarian Law (*Comité Inter-Ministériel des Droits de l'Homme et du Droit International Humanitaire*) was created by Decree No. 97-674 of 2 July 1997. The principal task of this internal government body is to provide a framework for government coordination, where ministerial departments will be able to harmonize their views on human rights issues. It coordinates the discussion and follow-up by the competent ministries of opinions and recommendations from competent human rights or humanitarian associations, as well as from the Senegalese Human Rights Committee. The Inter-Ministerial Committee on Human Rights and International Humanitarian Law is the main "interlocutor" for human rights organizations within the administration.<sup>299</sup> It provides for the examination, by the competent Ministries, of claims or allegations of human rights violations brought before them. It ensures the coordination of responses to such claims or allegations.<sup>300</sup> The Inter-Ministerial Committee also advises and assists the government in the promotion and application of international (humanitarian) law and ensures that Senegal's legislation is in line with the provisions of the international human rights instruments to which Senegal is a party.<sup>301</sup> It complements the work of the Senegalese Human Rights Committee and ensures the preparation, submission and presentation of Senegal's various

<sup>296</sup> The CSDH stated that they are underfunded and have inadequate financial, material and human resources to allow the national human rights institution to fulfil its mandate. The Senegalese authorities decided therefore in 2013 to provide it with proper premises and doubled its budget to 70 million CFA francs.

<sup>297</sup> The Senegalese President appoints the president of the CSDH, which is not in line with the Paris Principles.

<sup>298</sup> United Nations General Assembly, *National Report of Senegal*, Human Rights Council, A/HRC/WG.6/17/SEN/1, 23 July 2013, p. 3, para. 10.

<sup>299</sup> United Nations Economic and Social Council, *Second Periodic Report, Senegal*, E/1990/6/Add.25, 31 August 2000, p. 5, para. 23.

<sup>300</sup> *Ibid.*

<sup>301</sup> United Nations Committee on the Elimination of Racial Discrimination, *Fifteenth Periodic Report, Senegal*, CERD/C/408/Add.2, 19 November 2001, p. 12, para. 64.

periodic reports, in accordance with the various international human rights instruments.<sup>302</sup> The Inter-Ministerial Committee represents Senegal in international human rights bodies.<sup>303</sup>

#### 9.4 National Human Rights Advisory Council<sup>304</sup>

The National Human Rights Advisory Council (*Conseil Consultatif National des Droits de l'Homme*) is composed of members from all relevant ministries and civil society organizations that work to promote and protect human rights. The National Human Rights Advisory Council assists the High Commissioner for Human Rights and the Promotion of Peace and is placed under the supervision of the Human Rights Directorate.<sup>305</sup> It is responsible for coordinating the preparation of periodic reports of Senegal and monitoring the recommendations of the TMBs. Its mission is to ensure the implementation of the regional and international conventions on human rights, which Senegal is a signatory. Although questions were not asked during the interview about NHRI, one respondent (a representative of an international organization) argued: “the *Conseil Consultatif National des Droits de l'Homme* has never properly worked.” In July 2013, the National Human Rights Advisory Council was given a new lease of life and the new members were re-installed. At the end of 2013, the Human Rights Directorate organized a three-day training for the new members of the Council to initiate them to the main instruments for the protection of human rights so as to better equip them of technical development and drafting of periodic reports.

#### 9.5 Office of the Ombudsman<sup>306</sup>

The Office of the Ombudsman (*Médiateur*) is an independent administrative authority, which was established by Act No. 91-14 of 11 February 1991, as amended by Act No. 99-04 of 29 January 1999. Its task is, among others, to ensure respect for the rights of Senegalese citizens and to provide additional guarantees to safeguard their interests. Any natural person or legal entity that considers that an organization<sup>307</sup> has failed to act in accordance with its mission of public service, may submit a complaint to the Office.<sup>308</sup> The Office of the

<sup>302</sup> United Nations Committee on the Elimination of Racial Discrimination, *Fifteenth Periodic Report, Senegal*, CERD/C/408/Add.2, 19 November 2001, p. 12, para. 63.

<sup>303</sup> Decree No. 97-674 of 2 July 1997.

<sup>304</sup> Unless otherwise cited, the information in this paragraph is cited from United Nations General Assembly, *National Report of Senegal*, Human Rights Council, A/HRC/WG.6/17/SEN/1, 23 July 2013, p. 4, para. 19.

<sup>305</sup> The Human Rights Directorate is set up within the Ministry of Justice in 2011. The directorate is in particular responsible for monitoring the fulfilment of international human rights obligations undertaken by Senegal and for publicizing, protecting and promoting human rights. See also United Nations General Assembly, *National Report of Senegal*, Human Rights Council, A/HRC/WG.6/17/SEN/1, 23 July 2013, p. 4, para. 18.

<sup>306</sup> This paragraph is cited from United Nations Committee Against Torture, *Third Periodic Report of Senegal*, CAT/C/SEN/3, 5 October 2011, p. 10, para. 40.

<sup>307</sup> An organization referred to under Article 1 of Act No. 99-04 of 29 January 1999.

<sup>308</sup> Article 8 of Act No. 99-04 of 29 January 1999.

Ombudsman may also conduct investigations on his own initiative, concerning any matter falling within his area of responsibility, whenever he has reasons to believe that a person or a group of persons has been wronged by the poor functioning of a public service.<sup>309</sup> The Office of the Ombudsman plays an important role as a liaison between the Administration and citizens who feel that their rights have not been upheld or that their interests have been harmed.

## 10 CONSTITUTIONAL GUARANTEES

Senegal's constitution was first drafted in 1959, and modified in 1960, 1963 and most recently in 2001. Senegalese law is marked by the constitutional guarantee of human rights, both in the preamble and in the body of the Constitution of 22 January 2001.<sup>310</sup> In this regard, the preamble explicitly affirms the State's adherence to several international human rights treaties, notably the UDHR, the CEDAW, CRC and the ACHPR: "The people of the sovereign nation of Senegal [...] affirm their adherence to the Declaration of the Rights of Man and of the Citizen of 1789 and to the international instruments adopted by the United Nations and the Organization of African Unity [now the African Union], notably the Universal Declaration of Human Rights of 10 December 1948, the Convention on the Elimination of Discrimination against Women of 18 December 1979, the Convention on the Rights of the Child of 20 November 1989 and the African Charter on Human and Peoples' Rights of 27 June 1981."

### 10.1 Primacy of international law

Senegal has a so-called "monist" system<sup>311</sup> and the Constitution of Senegal establishes supremacy of international law in the national legal system. Article 98 expressly states that: "treaties or agreements that have been duly ratified or approved shall, upon publication, take precedence over other laws, subject to their application, in the case of each agreement or treaty, by the other party." A question may arise as to whether or not 'other laws' referred to in Article 98 include the Senegalese Constitution itself. Article 97 of the Constitution clarifies this by providing that when an international agreement contains a provision contrary to the Constitution, ratification may only occur after the Constitution is revised. Consequently, international human rights treaties ratified by Senegal (and published in the *Journal Officiel*) are incorporated into the domestic legal system. International law becomes directly applicable within the Senegalese legal order and can accordingly be invoked directly before the national courts. However, in reality this is done very rare and does not seem to be explicit in

<sup>309</sup> Article 30 of Act No. 99-04 of 29 January 1999.

<sup>310</sup> As adopted on 22 January 2001 and amended in 2003, 2006 and 2007. For the Constitution including the five subsequent amendments, see *Constitution de la République du Sénégal du 22 janvier 2001*, available at <http://www.gouv.sn/-Constitution-du-Senegal-.html> [Last Accessed 1 October 2015].

<sup>311</sup> In a monist state, international law does not need to be translated into national law, but it has automatic effect in national laws.

judicial practice in Senegal.<sup>312</sup>

## 10.2 Equality and non-discrimination

The Senegalese Constitution establishes the enjoyment of rights without discrimination. The preamble of the Constitution includes a denunciation of all forms of injustice, inequality and discrimination. Specific provisions of the Constitution explicitly condemn and seek to eliminate all forms of discrimination. Article 1 states: “Senegal is a secular, democratic and social republic which guarantees the equality of all citizens before the law, without distinction as to origin, race, sex or religion, and respects all faiths.” In Article 5, the Constitution declares punishable by law “any act of racial, ethnic, or religious discrimination, as well as any regionalist propaganda infringing the internal security of the State or the territorial integrity of the Republic.” Furthermore, equality of men and women is explicitly guaranteed in Article 7 of the Senegalese Constitution: “All human beings are equal before the law. Men and Women are equal.” A number of provisions in the Constitution expressly establish the right of women to equal treatment before the law, in areas as access to public services (preamble), access to land and property (Article 15), access to health services (Article 17), employment, wages and taxation (Article 25). Parity for men and women in access to elective and political posts has been guaranteed ever since article 7 of the Constitution was amended in November 2007.

The Senegalese Constitution does not prohibit “harmful practices” (as is the case in for example Ghana and Ethiopia),<sup>313</sup> although it explicitly forbids “physical mutilations” in Article 7. This article provides that the human person is sacred and inviolable and that the State has the obligation to respect and protect it. The individual is entitled to the right to life and physical integrity, and particularly to protection against all physical mutilations.

## 10.3 Protection of other human rights

Apart from the rights that guarantee equality and non-discrimination, the Constitution protects also various other human rights, which are enshrined under Title II of the Constitution, entitled “Civil Liberties and the Human Person: Economic, Social and Collective Rights.” Article 7 to 25 of the Constitution include, among others, the civil and political freedoms (freedom of opinion, freedom of expression, freedom of the press, freedom of association, freedom of assembly, freedom of movement and freedom of manifestation), the cultural freedoms, the religious freedoms, freedom of ideology, trade-union

<sup>312</sup> One important example in this regard is the case of *Suleymane Guengueng and Others v Hissène Habré* (2002) AHRLR 183, where the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was refused applicability.

<sup>313</sup> Article 39(2) of Ghana’s Constitution provides that traditional practices that are injurious to a person’s health and well-being are abolished. Article 35(4) of Ethiopia’s Constitution proclaims that the State has the duty to guarantee the right of women to be free from the influence of harmful customary practices. All laws, stereotyped ideas and customs which oppress women or otherwise adversely affect their physical and mental well-being are prohibited.

freedoms, freedom of enterprise, the right to education, the right to know how to read and write, the right to own property, the right to work, the right to health, the right to a healthy environment, the right to have access to multiple sources of information, freedom of expression and the right to demonstrate. The Senegalese constitution is very progressive and includes provisions on many human rights. Although no specific questions about the Constitution were asked during the interviews, some respondents referred to the Constitution as a “copy-paste of the Universal Declaration of Human Rights.” Indeed, the Senegalese Constitution is very comprehensive and state that the Senegalese people recognize the existence of inviolable and inalienable human rights as the basis of every community, of peace and justice in the world (Article 7 of the Constitution). However, there are major vacuums and gaps in the national laws when the Constitution is applied. Several TMBs expressed its concern about the *de jure* and *de facto* inequality that exists between men and women in Senegalese society.<sup>314</sup> Some national laws in Senegal remain deeply discriminatory against women, in particular in matters relating to the family. Provisions of the Family Code concerning marital authority, parental authority,<sup>315</sup> choice of residence,<sup>316</sup> property,<sup>317</sup> divorce, minimum age for marriage,<sup>318</sup> levirate and sororate<sup>319</sup> (traditional practices where a man may marry his dead brother’s widow or his dead wife’s sister) are not only unconstitutional, but also in violation with the ratified international human rights treaties such as the CEDAW.<sup>320</sup>

<sup>314</sup> United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations, Senegal*, E/C.12/1/Add.62, 24 September 2001, p. 3, para. 15 and p. 5 para. 38 and p. 11, para. 74; United Nations General Assembly, *Compilation Prepared by the Office of the High Commissioner of Human Rights*, A/HRC/WG.6/4/SEN/2, 18 December 2008, p. 5, para. 13.

<sup>315</sup> According to article 152 of the Family Code, the husband is head of the family with authority over the household and children. Article 277 states, “During the marriage [parental authority] is exercised by the father as head of the family.” Moreover, article 3 provides: “Any legitimate child carries the father’s name. Where a child is disowned, he takes the mother’s name”. According to article 4, “A child born outside marriage takes the mother’s name. Where a child is recognised by the father, he takes the latter’s name”.

<sup>316</sup> The husband has the choice of family residence; the wife is obliged to live there with him and he is obliged to take her in (Article 153 of the Family Code).

<sup>317</sup> According to Article 375, household expenses are the responsibility of the husband. Where the dowry system of marriage applies, under the terms of Article 385, any property given to a woman when she marries by persons other than her husband and that are subject to the rules of dowry (property, assets deposited at the bank and animals) are handed over to the husband. For as long as the marriage lasts, he manages these as a “good husband and father”.

<sup>318</sup> The minimum legal age for marriage is 18 years for men and 16 years for women (Article 111). Women may not remarry until a period of 300 days has elapsed from the date the previous marriage was dissolved (Article 112). The authorisation of payment of a dowry by the husband (Article 132) promotes the perception of the wife as the property of the husband.

<sup>319</sup> Although Article 110 provides that marriage between a brother-in-law and sister-in-law is forbidden, it permits levirate and sororate where the marital union that led to the alliance was dissolved as a result of death.

<sup>320</sup> United Nations Committee on the Elimination of Discrimination Against Women, *Concluding Observations, Senegal*, CEDAW/C/SEN/CO/3-7, 28 July 2015, para. 8-9.

## 11 CRIMINALIZING FGM/C IN SENEGAL

### 11.1 Political commitment

From an historical perspective, efforts in Senegal to abandon FGM/C began in the 1970s.<sup>321</sup> Political commitment grew over time. In February 1984, Senegal hosted an UN-sponsored conference<sup>322</sup> that aimed to consider anti-FGM/C policy programmes and actions to stop FGM/C in the African region.<sup>323</sup> Delegates from more than 20 African countries attended the conference. A fundamental outcome was the formation of the IAC. According to the IAC, “there was a critical need for an African regional voice in an international campaign against FGM.”<sup>324</sup> One of the primary mandates of the IAC was to call for governments to use existing national legislation to criminalize FGM/C, and to implement legislation specifically banning the practice.<sup>325</sup> On 5 April 1984, President Abdou Diouf declared at the opening of a seminar in Dakar on traditional practices affecting the health of mothers and children, that the “decline of the survival of excision should be accelerated through education, not anathema.”<sup>326</sup> In 1996, a conference on traditional practices harmful to women’s health was held in Casamance (Southern part of Senegal). Eight West-African States and CSOs from these countries were present to exchange experiences and strengthen strategies and programs to fight FGM/C. Following this conference, the Senegalese Minister of Health launched a prevention campaign against FGM/C, on 22 April 1997.<sup>327</sup> On 20 November 1997, during the 33<sup>rd</sup> Congress of the International Federation for Human Rights held in Dakar, President Abdou Diouf, openly took a stand against FGM/C. In his speech, he said the following:<sup>328</sup>

<sup>321</sup> United Nations Population Fund and United Nations Children’s Fund, *Joint Evaluation of the UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change (2008-2012) – Senegal* (Original in French: *Évaluation Conjointe du Programme Conjoint UNFPA-UNICEF sur les Mutilations Génitales Féminines/Excision: Accélérer le Changement (2008-2012) – Sénégal*), New York, July 2013, p. 10.

<sup>322</sup> The Conference was organized by the Working Group on Traditional Practices based in Geneva, with the support of UNFPA, UNICEF, WHO and the Ministry of Health of Senegal.

<sup>323</sup> B. Shell-Duncan et al., *Legislating Change? Responses to Criminalizing Female Genital Cutting in Senegal*, *Law & Society Review*, Volume 47, No. 4, 2013, p. 817.

<sup>324</sup> See the website of the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children, available at [http://www.iac-ciaf.net/index.php?option=com\\_content&view=article&id=10&Itemid=3](http://www.iac-ciaf.net/index.php?option=com_content&view=article&id=10&Itemid=3) [Last Accessed 1 October 2015].

<sup>325</sup> B. Shell-Duncan et al., *Legislating Change? Responses to Criminalizing Female Genital Cutting in Senegal*, *Law & Society Review*, Volume 47, No. 4, 2013, p. 817.

<sup>326</sup> Statement by the President of Senegal, Abdou Diouf on sexual mutilation: “*Accélérer le dépérissement de cette survivance qu’est l’excision par l’éducation et non par l’anathème*,” see bulletin of the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children, No. 2, July 1986, p.15.

<sup>327</sup> C.M.E. Nchama, *Female Genital Mutilation (FGM) in Africa and Around the World*, Republique et Canton de Geneve, Département des Institutions, Bureau de l’Intégration des Etrangers, CMEN/MKA/05.10.07, p. 15, available at <https://www.ge.ch/integration/doc/publications/mgf-monde-05-10-07-en.pdf>, [Last Accessed 1 October 2015].

<sup>328</sup> President Abdou Diouf’s speech, published in the newspaper *Le Soleil*.

"Whoever speaks of Human Rights must necessarily include Women's Rights. I am convinced that in this area, we can equally make progress. The Minister of Women, Children and the Family has developed a Plan of Action that we must enact with much willingness. A group of women legislators has also proposed the need to modify our laws to reinforce equality between the sexes in the areas of tax law, social protection, labor laws and the Family Code. Finally, let us fight vigorously against excision. A law is without doubt necessary to mark the government's commitment in this domain. But above all we need to convince the populations that this practice constitutes a threat for women's health – governmental and non-governmental organisations included. Excision frequently causes haemorrhages, infections and deaths during child-birth. Today this custom is no longer justified. In this respect, the example of Malicounda deserves being cited here. In this Senegalese village the women have become aware of the dangers of the practice and engaged in a dialogue with their husbands, the imam and the village chief. Through a collective decision the community decided that excision will never again be practised in their village. Today I formally appeal that this 'oath of Malicounda' propagates through the whole of Senegal. I request that a great debate about excision should be organised in each village so that everyone becomes aware that the time has come to change these ancient practices."

On 3 February 1998, President Abdou Diouf called for a law to criminalize FGM/C in Senegal at his Council of Ministers.

### 11.2 Adoption of the law against FGM/C

In June 1998, the Government submitted the draft of a specific law prohibiting FGM/C in Parliament. The official proposal for modifying the Penal Code gave the following motivation for criminalizing FGM/C: "Female Genital Mutilations, although part of traditional practices and customs, constitute intolerable violations of the physical and psychological integrity as well as the health of many women and young girls. These practices are no longer relevant in the new socio-cultural dynamic of Senegal. Their legal abolition as indicated in Article 299 of the penal code takes this into account and also the respect of international conventions ratified by Senegal, especially the convention of 1979 on the Elimination of all Forms of Discrimination towards Women and the convention of 1990 regarding Children's Rights."<sup>329</sup> Thus, in this proposal for the law criminalizing FGM/C, reference is made to the right to physical and psychological integrity and the right to health, as well as the CEDAW and CRC.

During the debate of this draft law, some *Marabouts* urged the Muslim deputies to vote against the bill. Parliamentarian Jean Paul Diaz opposed the passage of the law criminalizing FGM/C as saying: "My religion forbids me from voting against this law; excision is a religious problem. Prohibiting it challenges Article 19 of the Constitution, which gives citizens the right to exercise religion."<sup>330</sup> Other Parliamentarians argued that the law is unconstitutional, because "it contradicts the first paragraph of Senegal's

<sup>329</sup> Tostan, *Breakthrough in Senegal: Ending Female Genital Cutting, The Process that Ended Female Genital Cutting in 31 Villages*, Africa Operation Research & Technical Assistance/Project II Population Council, 1999, p. 69, available at [http://www.popcouncil.org/uploads/pdfs/frontiers/OR\\_TA/Africa/PD\\_Sen\\_Tostan\\_orta.pdf](http://www.popcouncil.org/uploads/pdfs/frontiers/OR_TA/Africa/PD_Sen_Tostan_orta.pdf) [Last Accessed 1 October 2015].

<sup>330</sup> See the newspaper *Le Soleil* of 15 January 1999.

constitution, which states that the government must respect all the beliefs of its citizens."<sup>331</sup> Another Parliamentarian argued: "We should have laws stopping anyone harming a woman's health, but the government has no right to criminalize a cultural practice that people have believed in for more than a thousand years."<sup>332</sup> While the male Parliamentarians were hesitant to vote in favor of the law, the female parliamentarians (being from ethnic groups that practice of FGM/C) were the greatest defenders of the law during the debate. Nevertheless, despite the contradictory views, the National Assembly passed the law – after almost 7 hours of debate – on 13 January 1999 at 11.20pm.<sup>333</sup> Law No. 99-05 modified the Penal Code not only to criminalize FGM/C in all its forms, but also sexual harassment, paedophilia and sexual assault, sexual violence and corruption of minors.

Art. 299*bis* of the Penal Code reads as follows:

"Those who have carried out or tried to carry out an attack on the integrity of the female genital organ by partial or total removal of one or more of its parts, by infibulation, by desentization or by any other means will be punished with six months to five years imprisonment. The maximum penalty will be applied if the sexual mutilations are carried out or promoted by a person in the medical or paramedical field. When the operation leads to death, the penalty will be hard work for life. The same punishment will be given to any person who gives instructions to commit these sexual mutilations or causes them by gifts, promises, enticements, threats, intimidation, abuse of authority or of power."<sup>334</sup>

Senegal became the sixth African country to outlaw FGM/C, after Burkina Faso, the Central African Republic, Djibouti, Ghana and Togo. To popularize the new law, the CSO Enda-Tiers Monde, in collaboration with the Free Clinic and the Belgian cooperation section in Dakar, published a comic booklet called *Bintou's Choice*. This comic book explained the harmful effects of FGM/C on women's health, the medical risks, and the conflicts it engenders within a couple. The booklet ended with a quiz that reminds readers that there is a law condemning the practice.<sup>335</sup> The questions that are asked encourage young people to think about FGM/C while inserting it into the Senegalese cultural context.

<sup>331</sup> D. Hecht, *Senegal: Ban on Female Circumcision Backfires*, InterPress Third World News Agency, 1999, available at <http://www.panix.com/~squigle/dcp/fgmlaw.html> [Last Accessed 1 October 2015].

<sup>332</sup> D. Hecht, *When a Law Sweeps in, Tradition Lashes Back*, 4 February 1999, available at [http://www.csmonitor.com/1999/0204/p1s3.html/\(page\)/4](http://www.csmonitor.com/1999/0204/p1s3.html/(page)/4) [Last Accessed 1 October 2015].

<sup>333</sup> D. Hecht, *Senegal: Ban on Female Circumcision Backfires*, InterPress Third World News Agency, 1999, available at <http://www.panix.com/~squigle/dcp/fgmlaw.html> [Last Accessed 1 October 2015].

<sup>334</sup> Author's translation, source: *Code Penal du Sénégal Annoté*, 1999.

<sup>335</sup> B. Ndiaye, *State Application of the Law on Excision in Senegal* (Original in French: *L'Etat d'Application de la Loi sur l'Excision au Sénégal*), Ministry of Family and Women's Organizations, UNFPA and UNICEF, December 2010, p. 12, para. 20.



### 11.3 Why the law was adopted

During the interviews, I explored the views of the respondents regarding, amongst others, why the law against FGM/C (Law No. 99-05 of 29 January 1999) has been adopted in Senegal. The respondents explained that there are many different reasons behind the adoption of the law, which are described below.

#### 11.3.1 *More knowledge about FGM/C*

Some respondents, (including representatives from the government, civil society and international organizations) explained that the starting point of the development of a national law against FGM/C was in the 1990s when the Senegalese people were informed about the practice. The largest ethnic group of Senegal (Wolof) does not practice FGM/C (see also section 5.4.). Three-quarter of Senegalese women have not been subjected to FGM/C in Senegal. Therefore, many Senegalese were not aware of this practice and did not know what it exactly entailed, respondents explained. A representative of civil society said: “before the 1990s FGM was not very well known by all Senegalese people.” However, this changed due to the work of CSOs in the field. These CSOs were mainly working in the health sector and they discovered that FGM/C was widely practiced in some communities. A civil society representative explained that “When Senegalese NGOs went to the field, they saw catastrophic events happening.” These CSOs brought to the attention of the ‘general public’ in Senegal what the practice of FGM/C entails, what the health consequences of the practice were and how FGM/C undermined women’s reproductive health. These CSOs also explained that young girls and women were dying because of the practice. According to some respondents, thanks to the work of CSOs “people discovered in the mid 1990s what FGM means.” At that moment, the Senegalese population “realized they needed to do something against it.” This understanding that FGM/C was happening in Senegal was, according to some respondents, the starting point for the development of a law against the practice.

#### 11.3.2 *More media attention for victims of VAW*

Representatives of civil society and the government (representatives of international organizations did not mention this problem) explained that in the 1990s, some severe cases of violence against women and girls gained a lot of media attention in Senegal. This created, according to the respondents, an “enabling environment” in which the voices of victims of VAW were heard. A representative of civil society explained: “There was a woman from Kaolack and a woman from Diourbel. Both ladies had a problem with their husbands, because their husbands beat them and did many bad things with their wives for a long time. But the women did not engage to talk about it. They shut their mouth and cried a lot. And when they cried, their husbands would beat them again. In the end, after several years, both women died because of the beatings.” Both cases received a lot of media attention. In the following years, more and more cases of women who suffered from sexual violence, abuse, rape, domestic violence and FGM/C were in the news. Because of this media attention, action was taken against VAW in general and FGM/C specifically. As a result, respondents explained that female parliamentarians “engaged themselves to make that law being adopted.”

### 11.3.3 Advocacy efforts of Senegalese women's organizations

Almost all respondents (including representatives from civil society organizations, international organizations and the government) referred to the long fight and advocacy efforts of Senegalese women's groups and civil society organizations. Passing of the law was, according to the respondents, a result of many years of activism for women's rights in Senegal. Senegalese activists had been at the forefront of both local and global campaigns aimed at abandoning VAW in general and FGM/C specifically.<sup>336</sup> Respondents explained that these activists were very intelligent, strong, influential Senegalese women who were very engaged about women's rights issues. They were part of the feminist movement in Senegal and brought FGM/C to the attention of the public as part of a movement to change the social status of women in Senegal.<sup>337</sup> These CSOs, women's associations and intellectuals were convinced that FGM/C should be abandoned. Some of these women were legal scholars at the Institute for Human Rights and Peace at the Cheikh Anta Diop University in Dakar. They travelled a lot, were inspired by the international feminist movement and participated at the UN World Conferences on Women, for example in 1995 in Beijing, where FGM/C was debated. These women were referred to during the interviews as "intellectuals with big ideas." The women's organizations worked closely together and were able to effectively mobilise the Collective of Women Parliamentarians. The female presence in the Senegalese government, as well as women's activism, created a favourable climate for passing a law against FGM/C.<sup>338</sup> A study on the implementation of the law points in the same direction and concluded that the law against FGM/C "was adopted due to the determined mobilization of women's organizations including the Group of Women Parliamentarians."<sup>339</sup>

### 11.3.4 Role of President Abdou Diouf

Many respondents (including representatives from civil society organizations, international organizations and the government) referred to the efforts of President Abdou Diouf (1981 – 2000) as a reason for the adoption of the law against FGM/C. They argued that the President Diouf was a vocal supporter of efforts to stop FGM/C. His speech at the Congress of the International Federation for Human Rights in 1997 where he openly took stand against FGM/C was frequently mentioned during the interviews. Respondents characterized the President as being "very open-minded", "hardworking" "engaged" and "sensitive to the issue of VAW." He was referred to as an "advocate for human rights" who was "taking the lead to end FGM/C in

<sup>336</sup> B. Shell-Duncan et al., *Legislating Change? Responses to Criminalizing Female Genital Cutting in Senegal*, *Law & Society Review*, Volume 47, No. 4, 2013, p. 817.

<sup>337</sup> United Nations Children's Fund, *Excision in Senegal: Direction, Scope and Lessons Learned from the National Response*, (Original in French: *L'Excision au Senegal: Sens, Portée et Enseignements Tirés de la Réponse Nationale*), UNICEF Dakar, August 2008, p. 6.

<sup>338</sup> S. O'Neill, *Defying the Law, Negotiating Change: The Futanke's Opposition to the National Ban on FGM in Senegal*, Doctoral Thesis, Goldsmiths, University of London, 2012, available at <http://research.gold.ac.uk/8852/> [Last Accessed 1 October 2015].

<sup>339</sup> B. Ndiaye, *State Application of the Law on Excision in Senegal* (Original in French: *L'Etat d'Application de la Loi sur l'Excision au Sénégal*), Ministry of Family and Women's Organizations, UNFPA and UNICEF, December 2010, p. 5.

Senegal." A civil society representative said in this regard: "He really agreed with the idea that FGMC should stop. It should no longer be happening in Senegal." Another civil society representative argued: "At that period, Abdou Diouf was the president, the second president of this country. He was the one who was fighting and helping the women to get their rights." However, as a representative from civil society reminded, "it takes political leadership to adopt that kind of law." Indeed, FGM/C had been a subject long avoided by Senegalese politicians out of fear of losing the support of their constituents. It was a brave step to publicly state his opposition to FGM/C and to call for legislation outlawing it in 1998. Unfortunately, just after the adoption of the law President Diouf pulled back and claimed that the law was intended to be symbolic in nature.<sup>340</sup> The President argued that the law would be applied "intelligently" which some authors understood to mean that it won't be applied at all.<sup>341</sup> According to some respondents, it was because of the "political pressure" and the "influence of the religious leaders" that he made this decision. Furthermore, Momar Lo, the ruling party Parliamentarian who introduced the bill to parliament, argued: "No one is really going to go to jail. [...] The government will ensure the courts don't apply the law."<sup>342</sup> However, there were no provisions in place to ensure the purely symbolic nature of the law.<sup>343</sup> As a result, some people criticized the decision to criminalize FGM/C, arguing that the Senegalese government has little intention of enforcing the law, promoting women's equality, or protecting human rights.<sup>344</sup>

#### 11.3.5 Malicounda Bambara Public Declaration

Some respondents (including representatives from civil society organizations, international organizations and the government) mentioned the first public declaration of the CSO Tostan in Malicounda Bambara (a village near the city of Mbour) as a reason for the adoption of the law against FGM/C. They explained that this Public Declaration was an important event and a precursor to the law. A representative of civil society stated: "In 1997 the community of Malicounda Bambara decided to abandon FGM. It went from there." A representative of an international organization argued that "It was from the beginning the women from Malicounda Bambara. They started the movement. They decided to abandon. Then the women at the Parliament and the women from the Ministry, the government, brought it to the Council of Ministers and prepared the law."

On 31 July 1997, after having followed a community education program by Tostan, a group of 40 women in the village of Malicounda Bambara held a press conference and announced to journalists that they, their husbands, the village

<sup>340</sup> B. Shell-Duncan et al., *Legislating Change? Responses to Criminalizing Female Genital Cutting in Senegal*, *Law & Society Review*, Volume 47, No. 4, 2013, p. 817.

<sup>341</sup> D. Hecht, *Senegal: Ban on Female Circumcision Backfires*, InterPress Third World News Agency, 1999, available at <http://www.panix.com/~squire/dcp/fgmlaw.html> [Last Accessed 1 October 2015].

<sup>342</sup> D. Hecht, *When a Law Sweeps in, Tradition Lashes Back*, 4 February 1999, available at [http://www.csmonitor.com/1999/0204/p1s3.html/\(page\)/4](http://www.csmonitor.com/1999/0204/p1s3.html/(page)/4) [Last Accessed 1 October 2015].

<sup>343</sup> B. Shell-Duncan et al., *Legislating Change? Responses to Criminalizing Female Genital Cutting in Senegal*, *Law & Society Review*, Volume 47, No. 4, 2013, p. 817.

<sup>344</sup> M. Antonazzo, *Problems with Criminalizing Female Genital Cutting*, *Peace Review*, Volume 15, No. 4, 2003, p. 473.

chief and the religious leaders had made the decision to abandon FGM/C in their community.<sup>345</sup> Most of these women underwent the most severe type of the practice, and they realized that many of their health problems could be traced to FGM/C.<sup>346</sup> They cited human rights and talked of the negative consequences this practice can have on the health of girls and women.<sup>347</sup> They told the reporters: "We are not attacking our traditions, we are trying to change a practice that has dangerous health consequences for our daughters."<sup>348</sup> Although it was not the immediate intention of the women to stop FGM/C all across Senegal, the Public Declaration became (inter)nationally important and other villages and groups of villages followed Malicounda Bambara's example (including the villages of Nguerigne Bambara, Keur Simbara, Bagana, Medina Fajal, Soudiane, Sorabougou, Kobongoy, Fajal, Samba Diallo, Diabougou, Baboucar, Samba Dia).<sup>349</sup> The Public Declaration was extensively publicised in newspapers (for example *Le Soleil*, *Le Matin*, *Nouvel Horizon* and *Dakar Soir*) and via television and radio broadcasts. The "mediatisation" of the Malicounda Bambara Declaration played a crucial role in the development towards a national public debate on FGM/C and the need for a national law criminalizing the practice.<sup>350</sup> According to Sarah O'Neill, the Public Declaration was "reproduced through the national media in a way that depicted Senegal as moving away from harmful traditions, changing in the ways prescribed by the UN, and abiding by the 'international standards' recommended by the WHO. The fact that Hillary Clinton also visited the women of Malicounda, to hear about their resolution and to congratulate them for having the courage to end the practice, underlined that this event was not just significant for the inhabitants of Malicounda but of interest across the whole world."<sup>351</sup>

<sup>345</sup> Tostan, *Breakthrough in Senegal: Ending Female Genital Cutting, The Process that Ended Female Genital Cutting in 31 Villages*, Africa Operation Research & Technical Assistance/Project II Population Council, 1999, p. 11, available at [http://www.popcouncil.org/uploads/pdfs/frontiers/OR\\_TA/Africa/PD\\_Sen\\_Tostan\\_orta.pdf](http://www.popcouncil.org/uploads/pdfs/frontiers/OR_TA/Africa/PD_Sen_Tostan_orta.pdf) [Last Accessed 1 October 2015].

<sup>346</sup> D. Gillespie, *Villagers Ending Female Genital Cutting*, Seattlepi.com, Hearst Communications Inc., 16 August 2007, available at <http://www.seattlepi.com/local/opinion/article/Villagers-ending-female-genital-cutting-1246828.php> [Last Accessed 1 October 2015].

<sup>347</sup> Tostan, *Breakthrough in Senegal: Ending Female Genital Cutting, The Process that Ended Female Genital Cutting in 31 Villages*, Africa Operation Research & Technical Assistance/Project II Population Council, 1999, p. 11, available at [http://www.popcouncil.org/uploads/pdfs/frontiers/OR\\_TA/Africa/PD\\_Sen\\_Tostan\\_orta.pdf](http://www.popcouncil.org/uploads/pdfs/frontiers/OR_TA/Africa/PD_Sen_Tostan_orta.pdf) [Last Accessed 1 October 2015].

<sup>348</sup> A. Molloy, *However Long the Night: Molly Melching's Journey to Help Millions of African Women and Girls Triumph*, HarperCollins, 2013, p. 130.

<sup>349</sup> Tostan, *Breakthrough in Senegal: Ending Female Genital Cutting, The Process that Ended Female Genital Cutting in 31 Villages*, Africa Operation Research & Technical Assistance/Project II Population Council, 1999, p. 56, available at [http://www.popcouncil.org/uploads/pdfs/frontiers/OR\\_TA/Africa/PD\\_Sen\\_Tostan\\_orta.pdf](http://www.popcouncil.org/uploads/pdfs/frontiers/OR_TA/Africa/PD_Sen_Tostan_orta.pdf) [Last Accessed 1 October 2015].

<sup>350</sup> S. O'Neill, *Defying the Law, Negotiating Change: The Futanke's Opposition to the National Ban on FGM in Senegal*, Doctoral Thesis, Goldsmiths, University of London, 2012, p. 77-86, available at <http://research.gold.ac.uk/8852/> [Last Accessed 1 October 2015].

<sup>351</sup> *Ibid.*, p. 79.

### 11.3.6 Political will

Some respondents (including representatives from civil society organizations, international organizations, but mostly government representatives) mentioned the political will and the “institutional engagement” of the Senegalese government to criminalize the practice as the reason why the law against FGM/C was adopted in 1999. A representative of an international organization explained: “I think it was also the willingness from the government to move, to go ahead.” A representative of the government said: “We were engaged to respond to the call of women.” Another representative of the government explained: “The law of 1999 was mostly adopted because the government decided to make the law, there was political will, because the government wanted to do it.”

### 11.3.7 Western influence

Some representatives from civil society organizations and international organizations explained that “the West” influenced the adoption of the law criminalizing FGM/C. However, government representatives did not mention this reason. A representative of civil society argued: “The other countries in the world asked our country to ratify conventions, but also asked the government to implement this law. And they really decided to adopt that law because of the pressure of the international countries.” A representative of an international organization argued: “The international pressure is the reason. There was too much pressure at the international level to make countries implementing it in a national law regarding FGM.

Interestingly, some respondents referred to the fact that Law No. 99-05 criminalizing FGM/C was passed just one month before the US State Department’s annual report on human rights was to be released.<sup>352</sup> This report includes a list of African States that have criminalized FGM/C and those that have not. It is used as a guide for Congress and US agencies on how to allocate military and financial aid.<sup>353</sup> Critics therefore say that the government, which receives substantial aid from the US, adopted the law “to please American sensitivities.”<sup>354</sup> US organizations were not the only foreign actors that might have influenced the enactment of the law criminalizing FGM/C. UNICEF might also have indirectly influenced it, because they financed a study that was commissioned by the Ministry of Women, Family and Children and undertaken by Fall Sow, a Senegalese legal consultant. It was a study on ways the government should harmonize national laws in accordance with the provisions of the CEDAW.<sup>355</sup> The study suggested legislative changes and included a draft

<sup>352</sup> D. Hecht, *When a Law Sweeps in, Tradition Lashes Back*, 4 February 1999, available at [http://www.csmonitor.com/1999/0204/p1s3.html/\(page\)/4](http://www.csmonitor.com/1999/0204/p1s3.html/(page)/4) [Last Accessed 1 October 2015].

<sup>353</sup> D. Hecht, *Senegal: Ban on Female Circumcision Backfires*, InterPress Third World News Agency, 1999, available at <http://www.panix.com/~squigle/dcp/fgmlaw.html> [Last Accessed 1 October 2015].

<sup>354</sup> The Economist, *Female Genital Mutilation: Is it crime or culture? Banning the practice may not be the best way of ending it*, 11 February 1999, available at <http://www.economist.com/node/185966> [Last Accessed 1 October 2015].

<sup>355</sup> C.H. Heyns and F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, Martinus Nijhoff Publishers, 2002, p. 533.

for a proposed law on FGM/C. Furthermore, Fall Sow became later the head of the team that eventually drafted Law No. 99-05.<sup>356</sup> Drafts of this law have been circulated for almost a year to western aid organisations (particularly to USAID), but also to the representatives of the US, France, and UN development organizations based in Dakar.<sup>357</sup> However, Augusto Paganini, UNICEF's local resident representative stated: "The passage of the law was not an explicit policy of UNICEF, nor were we aiming at the law."<sup>358</sup> He further argues that it was a sovereign decision of the Senegalese government to adopt the law.<sup>359</sup> It is therefore quite understandable that at the time, a significant portion of the population thought that (foreign) donors and international partners had imposed this law on the Senegalese population.<sup>360</sup>

### 11.3.8 Influence of the human rights framework

The draft law of June 1998 that the Government submitted in Parliament includes a reference to several human rights and the CEDAW and CRC. This is an indication that the human rights framework had some influence on the adoption of the law criminalizing FGM/C. During the interviews, I also explored the views of my respondents, amongst others, whether the international (UN) and regional (AU) human rights framework had any influence on the adoption of the law criminalizing FGM/C.

The respondents gave a rather mixed picture during the interviews. Some respondents (including representatives from the government, civil society and international organizations) argued that the human rights framework did not have much influence on the adoption of the national law. When answering this question, a representative of an international organization argued: "No, no, no, no, no! For this law, all the Senegalese women's associations fought hard to get the law. There is no influence of the international human rights movement." A representative of an international organization said: "No, it was just from within." A representative of civil society argued: "It was just the engagement at the internal level, the level of the country. It were the women, because the violence against women was very important at that moment, because some women found out that some women even died because of the violence. That motivated the women to fight against it and to fight for a law. It was not the international order to make that pressure: no. [...] It is not really something international, but it's something really national." Another representative of civil society argued: "No, because we don't have a systematic system of implementing the conventions that we ratified. So, since there's not a rule that as soon as you ratify you have to change the laws in order to make them in harmony with the conventions, I can't say that the law is adopted in order to be

<sup>356</sup> D. Hecht, *When a Law Sweeps in, Tradition Lashes Back*, 4 February 1999, available at [http://www.csmonitor.com/1999/0204/p1s3.html/\(page\)/4](http://www.csmonitor.com/1999/0204/p1s3.html/(page)/4) [Last Accessed 1 October 2015].

<sup>357</sup> Ibid.

<sup>358</sup> D. Hecht, *When a Law Sweeps in, Tradition Lashes Back*, 4 February 1999, available at [http://www.csmonitor.com/1999/0204/p1s3.html/\(page\)/4](http://www.csmonitor.com/1999/0204/p1s3.html/(page)/4) [Last Accessed 1 October 2015].

<sup>359</sup> Ibid.

<sup>360</sup> AWEPA, *Senegalese Parliamentarians Mobilized Against Female Genital Mutilation: Dr. Omar Ndoeye Interview*, 11 October 2013, available at <http://www.awepa.org/news/interview-with-dr-omar-ndoye/> [Last Accessed 1 October 2015].

in accordance with the conventions.”

However, the majority of respondents (including representatives from the government, civil society and international organizations) argued the opposite. They were of the opinion that there is a link between the adoption of the national law and the human rights framework. A representative of civil society explained: “the law is adopted to implement CEDAW.” Another representative of civil society said: “for me it is a step in the implementation of those women’s rights protocols.” A representative of civil society argued: “The CEDAW framework was an enabling factor why the law was adopted. It created the environment in which the adoption of the law took place.” A representative of an international organization said: “There is a linkage between the national law and the international framework, absolutely. The women, who advocated and called upon the government to adopt the law, had the CEDAW in their hands. They said: “You ratify this and you have to adopt laws in line with CEDAW.” So it was a big tool for women to push the agenda. It is very, very important.” A government representative explained that the law against FGM/C was adopted in 1999, “because a lot of people wanted the human rights to be implemented in this country, they wanted also to take care of the rights of women. One right of women is to ban FGM. We cannot talk about human rights, or talk about women’s rights, without banning problems like FGM. And this law was created because they want more to take care of human rights. They were talking a lot about human rights, and talking about human rights rather than taking care about banning FGM is not possible so the law was adopted to make the aspects possible and implemented.”

A representative of an international organization argued: “The UN joint declaration was also a determining factor why many countries started their activities against FGM. Also, a new UN Resolution was adopted. This Resolution was specifically dealing with FGM, not generally with the health of women of children. This Resolution recommended governments to take actions against this practice. This movement at the international level made that several countries at the national level adopted laws and took other actions in the field of FGM.” A representative of civil society said: “The international framework influenced them. They influenced not the government, but the framework influenced the civil society, because the civil society knows the international body of treaties. They know all the conventions that our country ratified. And when the government refused to respect their engagement, so themselves, as they learned about the international conventions, so they understand everything and now they push the government to respect the obligation of the ratification. It is not the government who does the prevention most of the time in the region. It is the civil society. But sometimes, also, they need to understand that convention to make the government respect the obligation. Because otherwise, if they don’t understand it, they cannot push the government, so when they understand, they say to the government: “you should respect that”. A government representative argued: “There is clearly a link between the international human rights instruments and the national law against FGM in Senegal. We had the international conference in Beijing in 1995 and the conference in Mexico, in Nairobi, and many international conferences to ask to the country to increase human rights, women’s rights, and to promote human rights for all the human beings. And that’s why after this conference, the

Senegalese government took some measures to increase human rights for women. But the government worked before also on human rights. However, the conferences are a possibility for the government to increase the level for promotion for human rights. [...] You know, in our country, all Resolutions of the UN who concern our country, we must do our best to respect it. And our government does its best to ratify it, to accept the conventions. And always we explain the population that we are a member of the UN and that we must respect these conventions. It is not very easy, but always we try to explain that." A representative of civil society argued: "The human rights bodies did a good job, lobbying for the law." There are some indications that the recommendations of UN TMBs might have influenced the drafting of the law, since the letter from Senegal's prime minister calling on the ministry to draft the law begins by stating that a UN human rights committee had made a "recommendation."<sup>361</sup>

#### 11.4 Resistance against the adoption of the law

Although the 1999 law has supporters among many women and among CSOs pursuing the abandonment of FGM/C, the passing of the law in Senegal met with some significant opposition as well, respondents explained during the interviews.

##### 11.4.1 Resistance of practicing communities

Opposition against the enactment of the law came in the first place from the Senegalese communities who had a long-standing history of practicing FGM/C. They opposed the objectives of the law, because they believed that their local culture is being threatened. One example often referred to during the interviews was the following, rather shocking, event. During the debates on the law in December 1998, 120 girls aged 8 months to 10 years were forcibly cut in the Kédougou region (eastern part of Senegal). This time by a man, "as if to prove that the law does not accord with the local mentality."<sup>362</sup> This was considered to be "a masterful slap for all women, women's movements and activists who worked to pass such a law."<sup>363</sup> The mayor of Kédougou concluded: "We are not against the judgment of excision, but the decision of the Cabinet was made in haste. Our people are not prepared to accept this law."<sup>364</sup> With the adoption of the law, communities felt "a cultural attack on its norms and values", a civil society representative said.

Similarly, Shell-Duncan showed in her research that the legislative reform efforts in Senegal have been seen by some communities as "an attempt to "break culture" and to force assimilation with the dominant ethnic groups that

<sup>361</sup> D. Hecht, *When a Law Sweeps in, Tradition Lashes Back*, 4 February 1999, available at [http://www.csmonitor.com/1999/0204/p1s3.html/\(page\)/4](http://www.csmonitor.com/1999/0204/p1s3.html/(page)/4) [Last Accessed 1 October 2015].

<sup>362</sup> C.M.E. Nchama, *Female Genital Mutilation (FGM) in Africa and Around the World*, Republique et Canton de Geneve, Département des Institutions, Bureau de l'Intégration des Etrangers, CMEN/MKA/05.10.07, p. 15, available at <https://www.ge.ch/integration/doc/publications/mgf-monde-05-10-07-en.pdf>, [Last Accessed 1 October 2015].

<sup>363</sup> Ibid.

<sup>364</sup> Female-info-Africa, 21 January 1999.



do not practice FGM/C (what some called “Wolofization”).<sup>365</sup> She further explains that in some of their study communities, “reactance simmered below the surface, and it took little to incite fervent vocal opposition to the law. In one conservative community, following a tense focus group discussion, participants stood and chanted phrases such as, “We will not let our culture be destroyed!”<sup>366</sup>

#### 11.4.2 Resistance of Marabouts

Traditional leaders were even more irritated about the adoption of the law. The supreme *Marabout* of northern Senegal's Toucouleur people, Thierno Mountaga Tall,<sup>367</sup> pronounced a *fatwa*<sup>368</sup> in which he cited a Prophet's *Hadith* from which he inferred that FGM/C “is a corollary to circumcision [...] and both operations are intrinsic elements of human nature.”<sup>369</sup> He told his followers in this regard:<sup>370</sup> “I will go to jail if need be. [...] In fact, I will happily die, rather than be forced to renounce what I believe.”<sup>371</sup> When the law was debated in the Parliament the 13<sup>th</sup> of January 1999, Thierno Mountaga Tall distributed a document in the Parliament called ‘striking proofs concerning the recommendable practice of excision of young girls’ (*preuves éclatantes au sujet de la pratique recommandable de l’excision des jeunes filles*).<sup>372</sup> The document was carefully put together and contained information about the religious importance of FGM/C. It stated that Islam requires the practice and that all women should undergo the practice. The purpose of FGM/C is, according to Tall, to protect women from “excessive sensuality”<sup>373</sup> that could tempt a woman to commit despicable acts.<sup>374</sup> Tall further argued: “The wisdom of excision lies in the fact that the woman can abstain from sex for longer and thus guard her honour.” He reminded the Muslim Senegalese citizen that the teachings of the

<sup>365</sup> B. Shell-Duncan et al., *Legislating Change? Responses to Criminalizing Female Genital Cutting in Senegal*, *Law & Society Review*, Volume 47, No. 4, 2013, p. 830.

<sup>366</sup> *Ibid.*

<sup>367</sup> Thierno Mountaga Tall is the grandson of the legendary Islamic leader El Hadj Oumar Tall. For more information, see S. O'Neill, *Defying the Law, Negotiating Change: The Futanke's Opposition to the National Ban on FGM in Senegal*, Doctoral Thesis, Goldsmiths, University of London, 2012, p. 88, available at <http://research.gold.ac.uk/8852/> [Last Accessed 1 October 2015].

<sup>368</sup> A *fatwa* is a legal opinion or learned interpretation on issues pertaining to the Islamic law.

<sup>369</sup> M. Ndoeye, *Le Processus de Pénalisation de l'Excision au Sénégal: Enjeux et Perspectives pour les Droits Sexuels des Femmes*, Institut de Hautes Etudes et du Développement, Thèse de Doctorat No. 901, Genève, 2011, p. 134.

<sup>370</sup> D. Hecht, *Senegal: Ban on Female Circumcision Backfires*, InterPress Third World News Agency, 1999, available at <http://www.panix.com/~squigle/dcp/fgmlaw.html> [Last Accessed 1 October 2015].

<sup>371</sup> D. Hecht, *When a Law Sweeps in, Tradition Lashes Back*, 4 February 1999, available at [http://www.csmonitor.com/1999/0204/p1s3.html/\(page\)/4](http://www.csmonitor.com/1999/0204/p1s3.html/(page)/4) [Last Accessed 1 October 2015].

<sup>372</sup> S. O'Neill, *Defying the Law, Negotiating Change: The Futanke's Opposition to the National Ban on FGM in Senegal*, Doctoral Thesis, Goldsmiths, University of London, 2012, p. 88, available at <http://research.gold.ac.uk/8852/> [Last Accessed 1 October 2015].

<sup>373</sup> Tall argues the following: “Nous avons compris maintenant que l'intérêt de l'excision est de protéger la femme contre l'excès de sensualité qui pourrait la pousser à commettre des bassesses ou (simplement) à s'en approcher.” See T.M. Tall, *Preuves Eclatantes au Sujet de la Pratique Recommandable de l'Excision des Jeunes Filles*, Dakar, 1999, p. 15.

<sup>374</sup> S. O'Neill, *Defying the Law, Negotiating Change: The Futanke's Opposition to the National Ban on FGM in Senegal*, Doctoral Thesis, Goldsmiths, University of London, 2012, p. 88, available at <http://research.gold.ac.uk/8852/> [Last Accessed 1 October 2015].

Prophet as well as those of his wise followers should not be abandoned for foreign Western pretensions that are unfounded and false.<sup>375</sup> Interestingly, Tall also referred in his document to human rights: "To prohibit Muslims from the practice of the recommendations of their religion and their customs is a sinful act and an injustice that retards human rights." He reminds the reader that breaching human rights is condemned according to the constitution of the country – it is the right of every citizen to practice their religion and their beliefs without hindrance or harassment.<sup>376</sup> Tall concludes his document with stating: "there is no doubt about the fact that these practices are harmful to people's health, as has been proven by modern medicine."<sup>377</sup> In the name of religion he therefore pleaded for medicalisation of the practice instead of criminalization. Parliamentarians who adhered to the Tijaniyya brotherhood felt loyalty towards the most influential *Marabout* from Fouta Toro. These Parliamentarians were strongly influenced by the document<sup>378</sup> and raised questions during the debate about FGM/C and religion. Some Parliamentarians said that they could not vote for the law because they did not want to criminalize their relatives for respecting tradition and religion.<sup>379</sup>

#### 11.4.3 Resistance of CSOs

Resistance against the law has not come from FGM/C supporters alone, but – perhaps more unexpectedly – also from some civil society organizations. Although some CSOs were in favour of a law penalizing the practice (such as COSEPRAT), other CSOs were against the adoption of the law in 1999. Molly Melching, director of the CSO Tostan, explained that at first she also lobbied for the law: "I thought it was a wonderful idea. But, as I discussed it with the villagers, they felt it was too soon," she says.<sup>380</sup> The day before the vote, Melching went with a delegation of villagers (including villagers from Malicounda Bambara) to the Parliament, trying to convince legislators to reconsider it.<sup>381</sup> Tostan felt it was important for the government to take a firm stand against the practice by voting the law. But they requested a delay in the application of the law, because a wide sensitization campaign among the practicing communities was first needed.<sup>382</sup> The villagers explained that if the

<sup>375</sup> S. O'Neill, *Defying the Law, Negotiating Change: The Futanke's Opposition to the National Ban on FGM in Senegal*, Doctoral Thesis, Goldsmiths, University of London, 2012, p. 89, available at <http://research.gold.ac.uk/8852/> [Last Accessed 1 October 2015].

<sup>376</sup> *Ibid.*

<sup>377</sup> *Ibid.*

<sup>378</sup> *Ibid.*, p. 90.

<sup>379</sup> Tostan, *Breakthrough in Senegal: Ending Female Genital Cutting, The Process that Ended Female Genital Cutting in 31 Villages*, Africa Operation Research & Technical Assistance/Project II Population Council, 1999, p. 71, available at [http://www.popcouncil.org/uploads/pdfs/frontiers/OR\\_TA/Africa/PD\\_Sen\\_Tostan\\_orta.pdf](http://www.popcouncil.org/uploads/pdfs/frontiers/OR_TA/Africa/PD_Sen_Tostan_orta.pdf) [Last Accessed 1 October 2015].

<sup>380</sup> D. Hecht, *When a Law Sweeps in, Tradition Lashes Back*, 4 February 1999, available at [http://www.csmonitor.com/1999/0204/p1s3.html/\(page\)/4](http://www.csmonitor.com/1999/0204/p1s3.html/(page)/4) [Last Accessed 1 October 2015].

<sup>381</sup> A. Molloy, *However Long the Night: Molly Melching's Journey to Help Millions of African Women and Girls Triumph*, HarperCollins, 2013, p. 199.

<sup>382</sup> V.A. Ginsburgh and D. Throsby, *Handbook of the Economics of Art and Culture*, Volume 2, Newnes, 2013, p. 671.

law is enforced before education, “criminalization would hinder their cause.”<sup>383</sup> Melching argued that the law could undermine their work and efforts in the field to stop FGM/C: “People in Europe and America think that the law means the end of FGC. What they don’t realize is that it can actually do more harm than good.”<sup>384</sup> The Minister of Justice refused to allow for a delay in the application of the law stating, “It was useless to vote a law that would not be applied immediately.”<sup>385</sup> After the law was passed, Tostan had to suspend activities. Melching claimed that the law has made Tostan’s work more difficult since it has increased defensiveness among the communities that practice FGM/C: “Village women did not want to participate in the programs, angry about the law that now made their friends and neighbours criminals. They felt betrayed by the group that had been saying it wanted to help them.”<sup>386</sup> Indeed, more CSOs had concerns that the law could increase tensions between on the one hand the ethnic groups that practice FGM/C (Mandingue, Soninke, Poular and Diola) and the dominant ethnic group, the Wolof, who do not practice FGM/C.<sup>387</sup>

### 11.5 Law came too early

Many respondents (including representatives from the government, civil society and international organizations – but mostly civil society representatives) argued that the country was not ready for the law. They explained that in their view the law came too early because the population was not prepared to accept this law. A representative of civil society explained: “The law came too soon, it was too early to adopt this law in 1999.” Another representative of civil society argued: “It was too soon for the population to accept and adopt that law, because they were not really sensitized. And they did not know or understand why the law was adopted. They did not understand why FGM was all of a sudden forbidden.” Many respondents argued that a “mistake” the Senegalese government made was that they did not consult the communities that practice FGM/C in drafting the law. Most practitioners of FGM/C were not at all aware that the government planned to formally criminalize the practice. Although drafts of the law were circulated among international organisations and development agencies,<sup>388</sup> the adoption of

<sup>383</sup> M. Antonazzo, Problems with Criminalizing Female Genital Cutting, *Peace Review*, Volume 15, No. 4, 2003, p. 474.

<sup>384</sup> D. Hecht, *When a Law Sweeps in, Tradition Lashes Back*, 4 February 1999, available at [http://www.csmonitor.com/1999/0204/p1s3.html/\(page\)/4](http://www.csmonitor.com/1999/0204/p1s3.html/(page)/4) [Last Accessed 1 October 2015].

<sup>385</sup> Tostan, *Breakthrough in Senegal: Ending Female Genital Cutting, The Process that Ended Female Genital Cutting in 31 Villages*, Africa Operation Research & Technical Assistance/Project II Population Council, 1999, p. 71, available at [http://www.popcouncil.org/uploads/pdfs/frontiers/OR\\_TA/Africa/PD\\_Sen\\_Tostan\\_orta.pdf](http://www.popcouncil.org/uploads/pdfs/frontiers/OR_TA/Africa/PD_Sen_Tostan_orta.pdf) [Last Accessed 1 October 2015].

<sup>386</sup> M. Antonazzo, Problems with Criminalizing Female Genital Cutting, *Peace Review*, Volume 15, No. 4, 2003, p. 474.

<sup>387</sup> D. Hecht, *Senegal: Ban on Female Circumcision Backfires*, InterPress Third World News Agency, 1999, available at <http://www.panix.com/~squigle/dcp/fgmlaw.html> [Last Accessed 1 October 2015].

<sup>388</sup> D. Hecht, *When a Law Sweeps in, Tradition Lashes Back*, 4 February 1999, available at [http://www.csmonitor.com/1999/0204/p1s3.html/\(page\)/4](http://www.csmonitor.com/1999/0204/p1s3.html/(page)/4) [Last Accessed 1 October 2015].

the law came as a surprise for the Senegalese population. A civil society representative argued: "People have to be listened to, involved, and engaged from the very beginning." A representative of civil society argued: "The approach of the law was not good, because it did not include the reality of the communities, they did not take them into account." They were not consulted during the process and it seems that the government tried to minimise dissent by simply not informing the population that the practice would be made illegal.<sup>389</sup> Because the law criminalizing FGM/C was not presented to the public for debate, Senegalese opposition parliamentarian Jean Paul Diaz argued that the law has "undermined our democratic process."<sup>390</sup> A civil society representative further explained: "Only a small percentage of intelligent Senegalese women were fighting for the law, but they did not represent the majority of the country. It's not them who were practicing most of the time, but it is the community." Similarly, another representative of civil society said: "It was a group of small educated westernized women adopting the law, but this is not the majority of our women." A representative of an international organization argued: "In Senegal there was a very strong feminist movement who created a good environment for having a law. But this movement was more at the high intellectual level and not reflected in the community dynamics. Therefore, in the communities there was no readiness to accept the law." For this reason, the Senegalese population did not understand why a practice they had been doing for thousands of years would be made illegal, respondents explained.

The respondents further explained that apart from the fact that communities were not prepared to accept the law, an additional problem – and perhaps more important – was that the religious and traditional leaders were not consulted during the process of criminalizing FGM/C in Senegal. A civil society representative explained: "The process of the law against FGM/C was not an inclusive process. Religious and community leaders were not included in the discussions. It was only the elite who made sure the law was passed at the National Assembly. This is a problem; because what is important is that the process is inclusive, share information, get the support of the key players such as religious and cultural leaders, and the communities where the practice is done. When this support is build, then you should put in place a law. At the time of the adoption of the law in 1999, the country was not ready in terms of support." Indeed, local leaders reported that they did not know about the law against FGM/C just before it passed.<sup>391</sup> A representative of civil society explained: "The law came too early because they should have sensitized communities and religious guides in order to get everybody together. So everybody is on the same page. Then the law would have passed easily without

<sup>389</sup> D. Hecht, *Senegal: Ban on Female Circumcision Backfires*, InterPress Third World News Agency, 1999, available at <http://www.panix.com/~squigle/dcp/fgmlaw.html> [Last Accessed 1 October 2015].

<sup>390</sup> D. Hecht, *When a Law Sweeps in, Tradition Lashes Back*, 4 February 1999, available at [http://www.csmonitor.com/1999/0204/p1s3.html/\(page\)/4](http://www.csmonitor.com/1999/0204/p1s3.html/(page)/4) [Last Accessed 1 October 2015].

<sup>391</sup> D. Hecht, *Senegal: Ban on Female Circumcision Backfires*, InterPress Third World News Agency, 1999, available at <http://www.panix.com/~squigle/dcp/fgmlaw.html> [Last Accessed 1 October 2015].

much resistance.” A representative of an international organization explained: “Normally the law is, what is coming out of a social change. For example laws to allow abortion in Europe and so on and so forth, they came after that you have a social movement. This was not the case of the FGM law in Senegal.”

However, not all respondents agreed with the argument that the law was adopted too early. A representative of an international organization argued: “A law was necessary in 1999 to start the movement against FGM, to make people going. The law made people think about their own traditions.” This respondent referred to the role and influence of religious leaders: “They don’t make their own choices, but they believe what *Marabouts* are telling them. They just accept it. Therefore, we need that law to change the views of the *Marabouts* and to change the public opinion. So therefore the law was good at that moment.” A representative of civil society argued “the law came at the time when it needed to come.”

### 11.6 Translating the law in local languages

Laws in Senegal are written in the French language and are published in the *Journal officiel du Sénégal*. Although French is the official language of the country, only a minority of the Senegalese population can read and communicate fluently in French. A representative of civil society said: “People in the communities did not know about the law, because the Senegalese laws are written in French.” Another representative of civil society explained: “And another thing, that law is in French. Its does not make any sense to have a law in French, when the people who you target and risk a prison sentence do not speak French. It is a little bit unfair.” Most people speak Wolof or one of the five other major national languages: Pulaar, Serer, Diola, Soninke, and Mandinka. A majority (65%) of the Senegalese population is illiterate (see also para. 5.3.1). Respondents explained that this was a major problem in the first years after the adoption of the law. A representative of civil society argued: “You have only around 37% educated people in this country. That means that around 63% is not educated and does not understand that law. You have to explain that law to them and educate them. If you don’t do it, it’s not going to work. So in the end, every time when you raise one problem in Africa, you raise ten more problems. However, in the end there is one big problem: e-du-ca-tion.” Many practicing communities did not know that the law existed. A representative of civil society explained: “The law against FGM was developed by the guys who are in the high level. But the people who are at the bottom practice FGM. They didn’t know that this law existed. It was important to give information about the content of the law to the communities.” A representative of civil society clearly indicated: “If you would really want to decrease harmful practices, especially FGM in Senegal, we need to open up to the majority of women, especially to those who have been victims of FGM. [...] Those who really suffer from FGM should be put at the forefront. I think that is the only way for us. Otherwise it is going to be intellectual researches, intellectual communication, in French, in foreign languages. Ok, now what? There is national law and an Action Plan against FGM but my sister who lives in a village 1000 km away from Dakar did not know that this law and Action Plan existed. It is written in French. She is illiterate. You know, these kind of things.”

To overcome this problem, the law had to be effectively communicated to the communities. The CSO Tostan took the initiative in collaboration with the Ministry of Women, Family and Children to translate the national law against FGM/C into six local traditional languages to inform people in villages in their own language about the law. In this way they were able to reach out to communities and inform the practicing communities about the law in their own language. Some respondents recommended that it would be good to not only translate the law, but also other documents – for example the NAPs and other policy documents – in these local languages, to “bring the documents to the people.” At the same time the respondents explained that although the law is translated in local languages, it is important to keep in mind that Senegal is an “oral society” with which they meant that there are other means rather than written documents to transfer information, like interactive radio programmes, discussion groups under the Palabre tree, dancing and theater, that are sometimes even more effective in raising awareness.

### 11.7 Knowledge of the law

All respondents reported knowledge of Law No. 99-05 of 29 January 1999 outlawing FGM/C. However, not all respondents were aware of the exact content of the legal provision. They did not know the exact penalty and who could be prosecuted. Some respondents thought that only parents could be prosecuted, but did not know that cutters could face trial as well. Other respondents thought that the penalty was much lower.

In 2010, Prof. Ndiaye conducted a study with the aim to get a more accurate picture of the status of implementation of Law No. 99-05 of 29 January 1999. The objective of this study was to assess the real impact of the law. Interestingly enough, one of the research questions of this study concerned the knowledge of the law.<sup>392</sup> Prof. Ndiaye concluded that all respondents knew about the existence of the law that criminalizes FGM/C, but that the respondents “do not know the content, except for judges and judicial police officers.”<sup>393</sup>

During the interviews, I also explored the views of the respondents regarding the knowledge of the population in relation to the existence of the Law No. 99-05 of 29 January 1999. All respondents explained that by now, according to their experience, everyone in Senegal – including the people living in the communities – has knowledge of the existence of the law criminalizing FGM/C. The same conclusions follow from a study done in 2013 by Shell-Duncan. She stated that: “In-depth interviews revealed that knowledge of the existence of a law banning FGM/C was widespread. Many informants reported hearing radio broadcasts informing the general public about the anti-FGM law, and others learned of the ban in *bantabas* (outdoor public meetings) organized by the elders, or through word of mouth. Most people, however, knew very few details about the content of the legal provision, including potential targets of

<sup>392</sup> B. Ndiaye, *State Application of the Law on Excision in Senegal* (Original in French: *L'Etat d'Application de la Loi sur l'Excision au Sénégal*), Ministry of Family and Women's Organizations, UNFPA and UNICEF, December 2010, p. 18, para. 1.3.1.

<sup>393</sup> Ibid, p. 6 and p. 27, para. 79.

prosecution, the penalty for violation, or whether the statute contains an extraterritoriality clause banning FGM/C outside of Senegal's national borders. Contrary to expectations, a vague understanding of the details of the ban did not reduce concerns about prosecution. Instead, it allowed people to imagine its application in a wide range of circumstances, including those beyond the true provision."<sup>394</sup>

### 11.8 Deterrent effect?

During the interviews, I also explored the views of my respondents, amongst others, whether the law against FGM/C in Senegal has any deterrent effect. The Senegalese law is aimed at deterring not only family members of young girls, but also cutters.<sup>395</sup> Almost all respondents (including representatives from the government, civil society and international organizations) argued that the law has no deterrent effect. They explained that although people are now aware of the existence of the law against FGM/C, they are not afraid of being sued. The knowledge of the law criminalizing FGM/C is not a motivation to abandon FGM/C.<sup>396</sup> The law - and punishment of six months to five years imprisonment - does not prevent or discourage parents or cutters from practicing FGM/C. People in Senegal continued to practice FGM/C after the adoption of the law. A representative of civil society explained: "It is good to have the law, but before it has any deterrent effect, people need to be convinced that it is a bad practice." Respondents explained that the reason for this is that people ascribe greater importance to religious and cultural norms. As long as people support the practice, a national law prohibiting FGM/C will not stop them. A representative of civil society claimed: "No, people are not afraid of the law. But we say in my country, that the reference of the people is religion. When the religious leaders say something, for example that FGM is a good practice and obliged by our religion, everybody does it. This argument for the religion is important. Another argument is the culture, that argument is also important. The cultural leader has as much influence. If they say that it should stop, it has more influence than the law. When you do advocacy for these leaders, and they accept it, nobody will do FGM any more. The law itself is not important, but it is important to inform the people. My reference point is therefore the religious and cultural leaders. If you are in a community, your religious or cultural leaders are your reference point, not the law. The people [CSOs red.] who come to the village and tell them that the law is in place, they will say: "That is not my problem. The government is not my problem." When this leader tells you that you should not do FGM, only then they will stop." Another representative of civil society explained that the law could only have deterrent effect if people are convinced that the law is in accordance to their own norms and values: "No, the law has no deterrent effect. If the people in the communities are not convinced about why they should stop FGM... That is the issue... They will continue to do

<sup>394</sup> B. Shell-Duncan et al., *Legislating Change? Responses to Criminalizing Female Genital Cutting in Senegal*, *Law & Society Review*, Volume 47, No. 4, 2013, p. 822.

<sup>395</sup> *Ibid.*, p. 829.

<sup>396</sup> *Ibid.*, p. 828.

it. The law would even work contra productive. They will hold on to their tradition." Another representative of civil society explained: "I think that culture is something difficult to put out. So if somebody believes in something, it is better to understand why this person believes that, rather than just blaming the person. Because some people... Even if they know that there is a law, they will argue that their culture is more important than the law. Therefore we first have to do the promotion and prevention on that case. Because a person who believes in something... even if there is a law prohibiting the practice, they cannot believe in this law. They will refuse to respect the law." Another representative of civil society argued: "I don't think the answer is putting people in jail. It is not okay to say to good, upstanding citizens who are doing a practice because they believe it is good for their daughter, and good for the society, and good for their extended family and good in general, to tell them "No, this is bad" and you put them in jail for it. [...] We are talking about changing social norms; we are talking about masses of people. That is why I say: it might work for a few, you might save a few people but we are talking about changing an entire society, an entire social network, with the whole social group. In that sense you can't do it this way with a law, this is not how things change. [...] But if a community gives their word and says "we are not going to do this" and they decide, "these are what our sanctions will be", then it is ok for me. Then it is a community decision, that's different. [...] If you are in a society where a national law is not accepted, I don't believe it should be enforced. I don't think you should be put in prison because you accepted to live under those laws."

A few representatives from the government and international organizations did not agree with the arguments given above. They were of the opinion that the law does have a deterrent effect. A government representative stated: "Many people in Senegal in the communities know that we have a law against FGM. The law is here for all of us. The law has deterrent effect, because people change." A representative of an international organization explained: "Some persons do fear, they are afraid about the law. They will stop with the practice or do it differently." A representative of an international organization said: "Yes, it does have deterrent effect. Communities are afraid of the law. Because now people who want to practice FGM go to another country to do the excision where there is no law against FGM, like Mali or Gambia. We also see in that women practice excision when their baby girl is 5 or 6 months. Or the women make excision at the day of birth. It is a new alternative practice."

During the interviews, none of the respondents mentioned the possible deterrent effect of the law in relation to the cutters. However, interestingly enough, when Shell-Duncan interviewed some former cutters for her study, they revealed that they had stopped practicing following the passage of the law. In addition, Shell-Duncan writes: "while the skills of circumcisers were previously passed down from one generation to the next, most claimed that they did not train an apprentice before "putting down the knife.""<sup>397</sup>

<sup>397</sup> B. Shell-Duncan et al., *Legislating Change? Responses to Criminalizing Female Genital Cutting in Senegal*, *Law & Society Review*, Volume 47, No. 4, 2013, p. 829.



## 11.9 Direct and indirect effects of the law

Although the threat of legal sanctions does not result in the abandonment of FGM/C in Senegal, many respondents (including from the government, civil society and international organizations) explained that the adoption of the law has several direct and indirect effects, which are described below.

### 11.9.1 Driving the practice underground

Before the adoption of the law that prohibits FGM/C, girls underwent the practice during a traditional cutting ceremony. Typically, the ceremony takes place once a year and all eligible girls within a community are cut on the same day by traditional cutters. This ceremony was a big celebration in which many surrounding villages and relatives of the families came together. It was seen as a party where people spend a lot of money and sacrificed animals.<sup>398</sup> Sister Fa, a famous Senegalese hip-hop star who uses her music to campaign for human rights and to bring an end to FGM/C testified: "I was with about 50 other girls in my village, and we were told this was a great celebration. We were laughing, dancing, playing - so free. This was the last time I ever again felt such freedom and trust. We were then taken into a room, one by one, where each of us was cut without anesthesia. I remember the blood and the pain even today."<sup>399</sup>

Many respondents explained (mostly representatives of civil society) that the increased awareness of the existence of the law made the practice go underground. Most people are nowadays not practicing FGM/C as openly as how they were used to in the past. People banned the traditional ceremonies and celebrations. Girls are cut in secrecy instead, because they are afraid that others would report the cutting to the police. One respondent stated: "People who still practice it, they do it in secret because they are afraid of the law. They are afraid to be punished." Some respondents also noted that people do not talk about the procedure any more, in order to avoid to be punished by the law: "They refuse to talk about it, they refuse to tell the others that their daughters were mutilated or not." Another respondent said: "This law does not make the practice disappear. It just makes it go underground." Isabelle R. Gunning already predicted in 1992 in her research that: "if people support the practice, then the law will not actually prevent the surgeries from being performed: people will just hide the fact that they are doing it."<sup>400</sup> Shell-Duncan and other researchers also noted the same trend towards "moving beyond the shadow of the law" in relation to FGM/C in Senegal.<sup>401</sup>

<sup>398</sup> B. Shell-Duncan et al., *Contingency and Change in the Practice of Female Genital Cutting: Dynamics of Decision Making in Senegambia*, Summary Report, 2010, p. 24.

<sup>399</sup> A.K. Ream, *Senegalese Rapper Uses Powerful Voice to Fight FGM*, WeNews, 8 June 2014 <http://womensenews.org/story/books/140607/senegalese-rapper-uses-powerful-voice-fight-fgm#.U8O0CSiD6YQ> [Last Accessed 1 October 2015].

<sup>400</sup> I.R. Gunning, *Arrogant Perception, World-Traveling and Multicultural Feminism: The Case of Female Genital Surgeries*, *Columbia Human Rights Law*, Volume 23, 1992, p. 229.

<sup>401</sup> See for example B. Shell-Duncan et al., *Contingency and Change in the Practice of Female Genital Cutting: Dynamics of Decision Making in Senegambia*, Summary Report, 2010, p. 25. See also B. Shell-Duncan et al., *Legislating Change? Responses to Criminalizing Female Genital Cutting in Senegal*, *Law & Society Review*, Volume 47, No. 4, 2013, p. 830. See also United Nations Children's Fund, *Legislative Reform to Support the Abandonment of Female Genital Mutilation/Cutting*, August 2010, p. 8.

### 11.9.2 *Younger girls*

Additionally, some respondents (mostly representatives of civil society) explained that another effect of the law is that girls in Senegal are increasingly cut at younger ages. They indicated that FGM/C is performed on younger girls, often babies who are only a few days to a few months old. Several reasons were put forth during the interviews why women decide to have their girls cut at younger ages and why that relates to the adoption of the law.

In the first place, some respondents explained that mothers who learn about the existence of the law against FGM/C rush to have their daughters cut, because they fear that the law will be more strictly enforced in the upcoming years. Since they don't want to be subjected to prosecution, they decide to have their daughters cut very young, since it is uncertain whether that is still possible in the future without punishment. A representative of civil society explained: "Mothers do it as soon as they can, because they know there is a law."

In the second place, some respondents argued that other community members or family members won't notice when a young baby underwent FGM/C, because "babies cry anyway" and community or family members wouldn't notice whether this is due to the FGM/C that has been performed on the girl or something else: "They do it on young babies, new-borns, three months old babies. Who will know that you did that to a baby? Nobody is going to know." Civil society representatives explained that girls usually were cut at an age when they were attending primary school. But one respondent emphasized: "After the girls are cut, they will stay home for a few weeks to let the wound heal. When the teacher knows that the girl is not coming to school, he will ask the parents why the girl is staying home." This is a problem, because parents might fear that the teacher (or parents of friends of the girl) would find out the reason why the girl is not attending school. When girls are cut before they have to go to school, parents don't have to face this problem, civil society representatives explained. Additionally, it was considered more difficult to find out that FGM/C is performed on babies than on older girls, as babies are not visibly absent from village activities during recovery.

In the third place, some respondents explained that since babies cannot talk, they cannot inform other community members or the police about what happened to them. A representative of civil society explained: "Girls of 8 or 9 years old have started to protest against the practice. They did not want to undergo the practice. They did not only protest, they also started to tell other people. The parents know that they cannot silence them, so they do it at a much younger age when they have no possibility to tell anyone else."

In the fourth place, some respondents explained that some parents are of the opinion that less harm is done when girls are cut at a very young age. A civil society representative explained that villagers are of the opinion that "babies don't remember well." Another civil society representative testified the following: "When I had discussions with the women, they said to me: 'When we cut our girls at age 14 it was very painful for them, so we thought we would spare them and we would do it younger, so we would do it at age 8 and then we were realizing, you know, it was even painful then, so we decided to do it when they are babies, because then it is not so painful.'"

### 11.9.3 *Crossing the borders*

Some respondents (mostly representatives of civil society) explained that due to the absence of a national law against FGM/C in Mali and Gambia, these neighbouring countries serve as a safe haven for communities that practice FGM/C. A representative of civil society argued: "Next door they don't have a law against the practice, so people can just go to these countries to have their daughters cut."

Although Guinea Bissau passed legislation that specifically bans FGM/C, some respondents argued that Senegalese girls are increasingly brought to Guinea Bissau as well to be cut as well, since this law "is not a strong law."<sup>402</sup> Senegalese mothers go with their girls across the border to cut them to escape punishment. Most of the time they visit friends and family who are living in these countries: "They are often the same family, or from the same community, the same ethnic group." The respondents explained that they stay with their relatives one or two weeks after the girl had undergone the procedure, to let the girl recover and the wounds heal. When they come back, nobody will know what happened. At the same time some respondents expressed their concern about the relatively new phenomena of "travelling cutters." They explained that FGM/C in Senegal is increasingly performed by Malian and Gambian cutters who come to Senegal to cut the girls and return to their home countries as soon as they have finished their job.

## 11.10 Importance of the law

During the interviews, I also explored the views of the respondents, amongst others, whether it is important to have a national law against FGM/C in Senegal. Almost all respondents were of the opinion that it is important to have a law criminalizing FGM/C in place. Only one representative of civil society argued that it is not important to have a law. This respondent explained: "People who practice FGM do not go to prison. The law is not implemented. People do not stop practicing FGM because of the law. Therefore, for me, the law is not important." However, all other respondents argued that it is important to have a law. A representative of an international organization explained: "I believe we should have a law in order to get an end to violence against women and FGM." A civil society representative stated: "There is no way to solve the problem FGM without having a law." The reasons why all these respondents considered it important to have a national law against FGM/C are listed below.

### 11.10.1 *Need for a legal framework*

Some respondents (including representatives from the government and international organizations) explained that the law is important, because it provides a reference, a legal framework that is needed to abandon FGM/C. A representative of an international organization explained: "For sure it is important to have a national law against FGM/C, because we need to have

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<sup>402</sup> The national prevalence is according to the MICS 2010 in Mali 89%, in Gambia 75% and in Guinea Bissau 41%.

legal frameworks. Especially in this area, you need to have legal frameworks." A representative of an international organization explained: "It is important to have the law, because the law works as a stick. You know, in French we have the expression '*la carotte et le bâton*' [the carrot and the stick, red.]. For me the law is very, very important because it gives a framework, a legal framework that says that FGM is forbidden."

#### *11.10.2 Engagement and responsibility of the government*

Some respondents (including representatives from the government, civil society and international organizations) explained that having a law against FGM/C is important, because it makes explicit that the government does not approve the practice and it shows the commitment of the government to end the practice. A representative of an international organization argued: "Yes, the law is important. The law has a big significance. The law explains the political position of the state and the law shows the community that the government is against the practice." A civil society representative explained: "I think is important to have law. The government has a right to express its engagement in any form." Some respondents (including representatives from the government, civil society and international organizations) also explained that it is the responsibility of the government to protect women and girls who are at risk of undergoing FGM/C in Senegal by means of legislative measures. They argued that the law is important because it is a decisive step towards greater protection of women. A government representative explained: "If you take a look at the percentage of people who practice FGM, there were too many girls and women suffering at that moment. So the law is there to protect these women and fight against FGM." A representative of an international organization further explained: "The law is a way to recognize the rights of women." A representative of civil society argued: "I believe the Government has an obligation to protect the citizens of our country." A representative of an international organization explained: "It is very important also for the population, for the women who suffer from FGM, to have this law." A government representative explained: "Yes, I think the law is important. I think that the law is a necessity. It is a necessity, because it is a means to struggle against this kind of tradition, FGM, and this kind of violence. And it is also a means for the government to improve their engagement and political will to protect all the members of the community in the same way. You know, FGM is a practice for young, very young women, girls, who have not the possibility to say that they don't want it. I truly believe that the law is a means to stop this practice."

#### *11.10.3 Law as a mechanism for prevention and protection*

Interestingly, many representatives of civil society and international organizations (government representatives did not give this argument) explained that the law is not an important tool in relation to prosecution, but rather for protection and prevention purposes. A representative of an international organization explained: "In case of FGM it is very sensitive to say that you need to punish and prosecute, because sometimes the exerciser is a mother who has lots of children. Then you are facing the dilemma: What is best? Is it in the interest of the children to put the mother in prison? That is why I think the law should be used as prevention, as a kind of warning mechanism at

the community level. And it can be also used as a way to regulate the disputes around the issue at the first level before going to the real justice procedures." Another representative of an international organization argued: "I think the law is important for prevention and protection. Not to say: The law is here, if you do FGM/C, you go to jail. No! The law is an element of prevention and protection to the community and to the young people. It is not an element of prosecution. No, for me that is not important." A civil society representative explained: "Yes, it is important to have a law. Not to denounce and to punish people, but I think mostly for prevention." Another civil society representative explained: "I believe that the government has an obligation to protect the citizens of a country, but I don't believe it's by putting people in prison. You might save a few girls, when you do that, but for me this is not the way to convince people. I always say renounce and not denounce. I don't believe in denouncing people, because it risks creating dangerous divisions in communities and triggering backlash."

#### *11.10.4 Law as a facilitator of the change process*

Some respondents (mainly representatives of civil society) explained that they see the law as a complementary tool that could accelerate the abandonment of the practice. They explained that the law could strengthen those in favour of ending the practice. The law sends out a message of support to those who have renounced FGM/C or want to renounce it. A representative of civil society explained: "The law can also contribute to convince the population which you are educating and sensitizing about FGM to stop it. It is like an extra argument to abandon FGM." Similarly, in her study, Shell-Duncan found evidence for the assertion that "the law may facilitate the change process by giving additional leverage to those who have become persuaded about the need to abandon FGM/C."<sup>403</sup>

#### *11.10.5 Limits of the law*

Some respondents (mostly representatives of civil society) explained that the criminalization of a cultural practice like FGM/C is very complex. They questioned whether legislation is an effective tool for ending FGM/C. A representative of civil society argued in this regard: "It's very complicated. The law is useful, but at the same time it is very important to see the limits of the law, to determine them and to try to mitigate them." A representative of an international organization explained: "I definitely think it's important to have a law. It is important you, know. It's not the only means and it's not the only strategy, but I think you always need to have the law." Another civil society representative argued: I believe that having law is important, but in the field of FGM having the law is not the most important thing." A government representative also stated: "Having the law alone is not enough." Some respondents (mostly representatives of civil society and international organizations) explained that although the law is important, the law is not the principal tool for ending FGM/C in Senegal. The law is, according to the

<sup>403</sup> B. Shell-Duncan et al., *Legislating Change? Responses to Criminalizing Female Genital Cutting in Senegal*, *Law & Society Review*, Volume 47, No. 4, 2013, p. 829.

respondents, not the “only means” or the “only strategy” to end FGM/C in Senegal. A representative of civil society explained: “You need to see the law as an instrument among other possible instruments. My point is that no matter of the stage, before enacting a law to ban a cultural practice, you should ask yourself if a law is the only and the most effective way of banning that practice which involves behavioural change, or if there are other means or a combination of ways to reach this objective. In this case, the function of the law is dissuasive but anthropologists and sociologists know for years that you cannot change a society by decree. Cultural change involves, among other things, awareness raising and relying on change agents such role models, which could be community, group of people or individuals. It is critical to identify who these change agents are.” UNFPA and UNICEF also are of the opinion that the law has its limits and won’t end FGM/C alone: “In Senegal, the FGM/C law is just one piece in a mosaic of approaches that are enabling the country to totally abandon FGM/C.”<sup>404</sup>

#### *11.10.6 Need for education, awareness raising and empowerment*

Many respondents (mostly representatives of civil society and international organizations) explained that the law needs to be preceded and complemented by educational/advocacy/sensitization/awareness raising activities and campaigns. A representative of civil society argued: “It is important to have a law, but education and empowerment will bring results.” Respondents explained that it is crucial to inform practicing communities about the harmful physical, medical, psychological effects of this practice. According to the UNFPA: “When, through discussions about human rights, people begin to understand that the high rates of maternal mortality, illness and debility that women have experienced were due in part to the effects of FGM/C, over time many communities spontaneously decide to abandon the practice.”<sup>405</sup> Another civil society representative said: “People need to know why the law is adopted and why people could face a prison sentence.” A civil society representative explained: “They prefer to be put in jail and that their family is happy.” A representative of civil society further explained: “You have to teach the people in the village about FGM. If you just put them in jail, you will lose your time. Because if they come out of jail, they haven’t changed their mind. The law alone cannot change their behaviour. You need to explain them, educate them.”

A representative of civil society explained: “I strongly believe that change comes from the grass roots. Until grassroots have the education and the empowerment they need, it is very difficult for them to have the confidence to stand up and promote a change.” A government representative argued: “What is necessary is education, that is important.” Another government

<sup>404</sup> See also United Nations Population Fund and United Nations Children’s Fund, *Senegal: Human Rights Key to Ending FGM/C, Legislation is Just One Aspect of an Effective Campaign*, p. 4, available at [http://www.unfpa.org/gender/docs/fgmc\\_kit/LawSenegal.pdf](http://www.unfpa.org/gender/docs/fgmc_kit/LawSenegal.pdf) [Last Accessed 1 October 2015].

<sup>405</sup> United Nations Population Fund and United Nations Children’s Fund, *Senegal: Human Rights Key to Ending FGM/C, Legislation is Just One Aspect of an Effective Campaign*, p. 1, available at [http://www.unfpa.org/gender/docs/fgmc\\_kit/LawSenegal.pdf](http://www.unfpa.org/gender/docs/fgmc_kit/LawSenegal.pdf) [Last Accessed 1 October 2015].

representative explained: “We have the law, but the best way is to increase the education level of the community.” A civil society representative explained: “We need to keep the law, but the most important thing is to do prevention and to do sensitization to the community, to the whole the population.”

A representative of an international organization emphasized that there is a causal link between the education level of the mother and the percentage of daughters who underwent FGM/C. The respondent argued: “If the level of education grows a bit, so if the mother is a bit more educated, you have a little bit less FGM/C. This is for me a sign, that education is important. I see a relationship here. If we have girls going to school, things are changing.” The respondent referred to the DHS-Continue 2012-2013 statistics<sup>406</sup> that reveal that the proportion of girls who underwent FGM/C decreases when the level of education of the mother increases: 21% among those whose mothers have no education against 4% when the mother has at least completed secondary education.

### 11.11 Court cases

During the interviews, I also explored the views of the respondents, amongst others, whether the amount of court cases is representative for the incidence of FGM/C in Senegal. All respondents argued that the law is not sufficiently enforced and that only a handful of individuals have been prosecuted since the adoption of the law in 1999.

#### 11.11.1 Number of court cases

The first year following the passage of the law has seen some arrests. In July 1999, the grandmother and mother of a five-year-old girl were arrested, following a complaint filed by the father of the girl alleging that the two women had ordered FGM/C performed on his daughter. The cutter was also charged. However, the cases were not pursued and no convictions resulted, because of “emotional public outcry in the region.”<sup>407</sup> The study of Prof. Ndiaye of 2010 investigated also the amount of court cases on FGM/C in Senegal since the adoption of the law in 1999. During their research, they found seven court cases between 1999 and 2010: one in Matam, one in Tambacounda and five in Kolda.<sup>408</sup> However, it proved to be very difficult for the researchers to get access to these cases, even though they had visited the regional courts. They reported: “The state of documentation in regional courts did not allow us to gather all the copies of the decisions that were made.”<sup>409</sup> Therefore, they failed to identify

<sup>406</sup> Agence Nationale de la Statistique et de la Démographie [Sénégal], et ICF International, *Enquête Démographique et de Santé Continue (EDS-Continue 2012-2013)*, ANSD et ICF International, 2012, p. 85-88.

<sup>407</sup> United States Department of State, *Senegal: Report on Female Genital Mutilation (FGM) or Female Genital Cutting (FGC)*, 1 June 2001, available at <http://2001-2009.state.gov/g/wi/rls/rep/crfgm/10107.htm> [Last Accessed 1 October 2015].

<sup>408</sup> B. Ndiaye, *State Application of the Law on Excision in Senegal* (Original in French: *L'Etat d'Application de la Loi sur l'Excision au Sénégal*), Ministry of Family and Women's Organizations, UNFPA and UNICEF, December 2010, p. 31, para. 88.

<sup>409</sup> *Ibid.*

how many persons have been prosecuted and punished. The researchers were only able to obtain a copy of the decision of the regional court in Matam.

#### 11.11.2 *Exceptional court case in Matam*

During the interviews, many respondents (including representatives from the government, civil society and international organizations) referred to this rather exceptional court case in Matam. On 25 April 2009, the Senegalese human rights organization RADDHO tipped the police that a 16-month-old girl had been cut by a traditional cutter in the village of Ourosogui, close to Matam (eastern part of Senegal). The cutter, the child's parents and her grandmother (who had hired the cutter) were arrested and prosecuted. During the trial it was revealed that the grandmother had frequently demanded and insisted that her granddaughter needed to be cut.<sup>410</sup> The case prompted a great uproar and stirred controversy with around 200 local *Marabouts* defending FGM/C as part of their tradition. They spoke out in defense of the cutter and of FGM/C and declared that the law prohibiting FGM/C should be repealed.<sup>411</sup> The religious leaders also demanded the liberation of the offenders. Demonstrators blocked the regional law courts with public transport buses to show their loyalty to the religious leaders. The trial took place under strong police surveillance and access to the law courts was denied to the public. Clashes broke out between the protesters and local police. The demonstrators threw stones at the police who used teargas to break up the protest. Shortly after the arrest of the cutter, the parents and grandmother a press statement was published by religious leaders, stating the following:

"Since the cold war and the demise of the Sophiet Union ex USSR [sic], Westerners led by the United States of America have been fighting Islam with intelligent methods which consist of combating certain practices that are recommended by Islam, to efface Muslim culture, for society without culture will disappear. This conflict is taking place in various ambiguous forms [sic]. NGOs have been created and say that they are there to help citizens understand their rights and duties, but in reality they are there to make Islam disappear. They will never succeed. Today, the Senegalese state (95% Muslim) allows itself to outlaw practices that are recommended by Islam, such as: - Excision was practised by Arabs since the time of the Prophet (peace and greeting be with him) [sic] who came to us with Islam. Non-Muslim African societies do not practise it. Our illustrious ancestors [sic] practised it without problems. Shame on those who voted for this satanic law! Shame on those who voted for this impractical [sic] law in Senegal!"<sup>412</sup>

Both of the child's parents were originally sentenced to three months in prison, but were later pardoned. The cutter and the grandmother were both sentenced

<sup>410</sup> United Nations Population Fund and United Nations Children's Fund, *Senegal: Human Rights Key to Ending FGM/C, Legislation is Just One Aspect of an Effective Campaign*, p. 2, available at [http://www.unfpa.org/gender/docs/fgmc\\_kit/LawSenegal.pdf](http://www.unfpa.org/gender/docs/fgmc_kit/LawSenegal.pdf) [Last Accessed 1 October 2015]. [Last Accessed 1 October 2015].

<sup>411</sup> United Nations Population Fund and United Nations Children's Fund, *Senegal: Human Rights Key to Ending FGM/C, Legislation is Just One Aspect of an Effective Campaign*, p. 3, available at [http://www.unfpa.org/gender/docs/fgmc\\_kit/LawSenegal.pdf](http://www.unfpa.org/gender/docs/fgmc_kit/LawSenegal.pdf), [Last Accessed 1 October 2015].

<sup>412</sup> S. O'Neill, *Defying the Law, Negotiating Change: The Futanke's Opposition to the National Ban on FGM in Senegal*, Doctoral Thesis, Goldsmiths, University of London, 2012, p. 243, available at <http://research.gold.ac.uk/8852/> [Last Accessed 1 October 2015].



to six months in jail, but were released after three months. One could argue that the sentences in this case seem very lenient, since the Senegalese law prescribes a penalty of up to five years imprisonment. However, taking into account the cultural context in Senegal, some people argued that the duration of the prison sentence is not that important, because “spending three months in prison amounts to a social death sentence,”<sup>413</sup> they are disgraced for the rest of their lives. The UNFPA further explains in this regard: “The people in this region are very proud. Over and above the number of days these ladies spent in prison, what is important is the terrible shame – the mere fact of going to jail. This makes a big impression on people.”

The court case in Matam received a lot of media attention (in papers, radio and television). According to UNFPA, the case made a great impression in Senegal. The whole country was talking about his case: “Before, people didn’t really pay much attention to this law. But now, because of all the media attention, they take the law more seriously. People used to say, ‘Oh, they’ll never put me in jail if I have my daughter cut.’ Now, they’ve seen that breaking the law actually has consequences.”

However, more striking is the following. A *Marabout* came to the judge in Matam and said: “This will be your last case. You will never judge another person.” The day that the judge of Matam sentenced the parents and the cutter to jail, he indeed fell ill and got a heart attack. Many people in Senegal were afraid and interpret it as a sign of God that the judge did the wrong thing. A representative of an international organization explained: “The judge of Matam had gone against the laws of ancestors in Senegal. The poor man... These sub-natural beliefs exist in Senegal.” At the time of this research, the judge was still prostrate in bed. One representative of civil society said: “He is at the hospital till now, he cannot even move his fingers.”

The consequences of this case for the enforcement of the law in Senegal are enormous. A government representative said: “Since then, no one dares to go further or to take definitive sanctions against a FGM case, even till today.” Indeed, since this case in Matam in 2009, there haven’t been any other court cases. Many respondents (including representatives from the government, civil society and international organizations) explained that no prosecutor, no lawyer and no judge dared to burn their fingers on an FGM/C case. A government representative said: “The case of Matam shows that all the magistrates think: “If it bites or not, don’t give your hand.”

Since it proved to be very difficult to get access to the court cases, respondents were asked if they knew more details about the other six FGM/C court cases. The respondents revealed that most of the arrested cutters or family members have not served the full prison sentence. They were released early, mainly because the village went on strike. A civil society representative explained: “When the case was in court in Sédhiou, the people were fighting and demonstrating and then they dropped the case.” The respondents also explained that in many instances, when family members and/or cutters got

<sup>413</sup> United Nations Population Fund and United Nations Children’s Fund, *Senegal: Human Rights Key to Ending FGM/C, Legislation is Just One Aspect of an Effective Campaign*, p. 4, available at [http://www.unfpa.org/gender/docs/fgmc\\_kit/LawSenegal.pdf](http://www.unfpa.org/gender/docs/fgmc_kit/LawSenegal.pdf), [Last Accessed 1 October 2015].

arrested, they were pardoned before the case could be judged. A representative of civil society explained: "The leaders of the community have much more power than the government. If the leaders threatened that they would go on strike again or protest with the whole community, cases were dropped."

#### 11.11.3 Lack of reports

During the interviews, I also explored the views of the respondents, amongst others, why the amount of court cases is not representative for the incidence of FGM/C in Senegal. Many respondents (including representatives from the government, civil society and international organizations) explained that the main problem is that people refuse to report FGM/C cases to the police. A representative of an international organization explained: "The law is not the problem. The law is there and the law is good. But the community does not report FGM cases to Justice. The lawyers do not have cases. Since 1999 we have, I think, only 7 court cases in Justice. And each and every case created big problems in Senegal." Similarly, a representative of civil society said: "My question is always: Who is going to complain? Nobody is reporting cases to the police."

The study of Prof. Birahim Ndiaye of 2010 assessing the implementation of the law criminalizing FGM/C revealed the following interesting course of events. The researchers interviewed judges and said: "Why don't you apply the law and condemn according to what the law says?" The judges said: "We don't have any cases. No cases have been brought to us about FGM/C." The researchers went to the police and they said to the police: "Why didn't you bring any case to the judge?" The police responded: "We don't hear of any case about FGM/C. No one comes to complain about FGM/C."<sup>414</sup>

The respondents (mainly civil society representatives) explained that people in Senegal often do not speak up about FGM/C, because it is considered a family matter. There is a sense of family and community solidarity. People are afraid they will be treated as social outcasts if they report FGM/C cases to the police. In addition, civil society representatives explained that young girls who underwent FGM/C do not have the capacity to put their parents in prison. They do not file a complaint and testify against their own neighbours, community members, friends, parents, grandparents, other family members or the cutters. In addition, the psychological effects on a young girl witnessing the arrest of her parents could be considerable. A representative of civil society said: "Who to sue and how and when? Knowing that you are living in the house with your grandmother, your mother. You've been a victim. Who are you going to take to jail? Who has the courage to do that? There is no green number, people will know that you did it." A representative of civil society further explained that it is important to take into account that they are often family members. If they have the courage to report a case and go to court, a problem might arise when the family members are released from prison: "How can you

<sup>414</sup> B. Ndiaye, *State Application of the Law on Excision in Senegal* (Original in French: *L'Etat d'Application de la Loi sur l'Excision au Sénégal*), Ministry of Family and Women's Organizations, UNFPA and UNICEF, December 2010.

expect these people living together afterwards? This is one of my main questions in relation to prosecution.”

In relation to the court case in Matam, the Senegalese human rights organization RADDHO tipped the police, not people from the community or family members. Respondents suggested that if the Senegalese government or police could guarantee anonymity, something might change in the future with regard to the reporting behaviour. A civil society representative argued: “It has to be anonymous. But can Senegal provide anonymity? That’s debatable, I don’t know if they can.” In Senegal it is not possible to anonymously report cases to the police. There is no hotline that people can call anonymously to report cuttings that are about to happen or have recently taken place.<sup>415</sup>

#### *11.11.4 Training of professionals in the Justice sector*

Some respondents (mainly representatives of civil society) emphasized that police officers, magistrates and lawyers are often part of the same community. A representative of civil society therefore explained that sometimes the police is reluctant to arrest cutters or family members of young girls who underwent the procedure or at risk of undergoing FGM/C, because: “We should not forget that many of this government officials, especially the police, the *gendarmierie*, they are part of the community and they share the same values.”

Some respondents explained that the police in Senegal are not ready to work on FGM/C cases. A representative of civil society said: “the police is not prepared to handle this kind of issues.” Another civil society representative explained: “Those people who are supposed to apply the law are sometimes very, very, resistant towards the topic. Sometimes they don’t even want to talk about excision. How are you then going to apply this law?” Several civil society representatives explained that as long as the police officer supports the practice and “when he wants to have his own daughter cut” he would not put effort in arresting “his friends and neighbours who believe in the same tradition.”

Some respondents (mainly civil society representatives) argued therefore that it is important to put more emphasize on trainings that specifically target the justice sector. A representative of civil society explained: “So it is not just having a law, but you should also have a discussion with justice, the people working in the court, in order to make sure they have the real tools and knowledge how to apply the law. People working at the police department should learn how to handle these cases if someone comes to complain about FGM, because it is something new for them.”

Some representatives of international organizations and civil society explained that in recognition of the challenge of enforcing the law against FGM/C, the UNICEF-UNFPA Joint Programme supported several activities focusing on capacity building of professionals in the justice sector. Indeed, the

<sup>415</sup> The Government of Burkina Faso established in 1990 a national telephone hotline called the “Green Phone: SOS Excision” to encourage people to report cases of FGM/C. These reports serve as the basis in Burkina Faso for legal interventions and prosecutions in many FGM/C cases. In Burkina Faso 192 people were convicted between 2009 and 2013 for FGM/C. See United Nations Population Fund and United Nations Children’s Fund, *Burkina Faso has a Strong Law against FGM/C, but Winning Hearts and Minds Remains Crucial*, available at [https://www.unfpa.org/gender/docs/fgmc\\_kit/burkinafaso.pdf](https://www.unfpa.org/gender/docs/fgmc_kit/burkinafaso.pdf) [Last Accessed 1 October 2015].

annual report of the UNICEF-UNFPA Joint Programme reveals that 250 people in Senegal were trained (including judges, prosecutors, lawyers, magistrates, local leaders and members of civil society organizations) in 2012 to effectively implement and enforce legal provisions against FGM/C.<sup>416</sup> Furthermore, according to UNICEF and UNFPA, the Ministry of Women, Family and Children organized workshops across Senegal to encourage the application of the law, attended by administrative authorities, local elected officials, and representatives of community-based organizations.<sup>417</sup>

#### *11.11.5 Time to enforce the law?*

Interestingly enough, during this research, a new trend was observed. Although the majority of respondents (including representatives of the government, civil society and international organizations) were in favour of an approach to focus on awareness-raising and argued that change could only come through education, it was remarkable that more and more respondents seemed to become in favour of punishing and prosecuting parents and cutters. Although people in the village do what they believe is right, as soon as they are aware of the harmful consequences of the practice, but still decide to continue practicing it, they should face a prison sentence, respondents claimed.

A representative of civil society said: "We have done enough sensitization the past twenty years, now it is time to put people in prison." Another representative of civil society explained that after many years of experience in the field, sensitizing communities about FGM/C for a long time, the respondent argued: "I do sensitization already for a long time. But every time I talk about human rights, I organize a meeting for the women... Sometimes I feel like I am wasting my time. How many times do I need to do this? FGM is still there." Another representative of civil society argued: "There have been enough public declarations, now it is time to start prosecuting. Now it's time to put people in prison." Even respondents, who protested in front of the parliament in 1999 against the enactment of the law, now declared that the law should be better enforced and people "should be arrested, thrown in jail, or subjected to corporal punishment." When these respondents were asked why it is necessary to put more people in prison, they replied: "Although the court case in Matam had some deterrent effect, people are not really afraid to get prosecuted." A representative of civil society explained: "It is important to have some examples, so more people will say: 'Oh, if I do FGM, I am going to prison.'" Another civil society representative explained: "Sometimes it is good to have more court cases, because if there are only a few cases, some people think that: 'Oh, I won't have any problem because nobody was put into jail' or 'If you put me in jail, tomorrow my parents will go on strike and I will be out in just 2 days or 1 hour. This needs to change'" A representative of an international organization raised the issue of the integrity of the government when

<sup>416</sup> United Nations Population Fund and United Nations Children's Fund, *UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change, Annual Report 2012*, p. 12, available at [http://www.unfpa.org/sites/default/files/pub-pdf/UNICEF-UNFPA%20Joint%20Programme%20AR\\_final\\_v14.pdf](http://www.unfpa.org/sites/default/files/pub-pdf/UNICEF-UNFPA%20Joint%20Programme%20AR_final_v14.pdf) [Last Accessed 1 October 2015].

<sup>417</sup> *Ibid.*

answering the question why it is necessary to focus more on prosecution. The respondent explained that it is important to raise the amount of FGM/C court cases for this reason: "It is important. I think it is also an issue of credibility for the government. They have a law, but when it's not enforced, the communities just continue."

### 11.12 Modifying the penal code

At the time of this research, the Senegalese government was undergoing a process of revision of the Penal Code and the Code of Penal Procedures. Interestingly, there was also a discussion at the Ministry of Justice to review the FGM/C legislation with the aim to increase the amount of court cases. The Ministry of Justice proposed that health professionals should be obliged to report FGM/C cases to the police. When questions were asked about this proposal during the interviews, it proved to be a very controversial issue in Senegal. The majority of the respondents (mostly representatives of civil society) were against this proposal. They were concerned that women will not come for help with their girls to health clinics or hospitals any more, if they run the risk of prosecution. One representative of civil society stated: "Can you expect someone at the local health post, who knows the community, to report the community? Are they really going to do that? Really? Would you report your friends? Of course you are not going to report your friends. I mean, yeah, maybe at the regional level it might be done, a doctor might report. But then, you are not going to have people going into the hospitals to get the health services that they need. So you will have a detrimental effect if you are scaring people off like that. Because then they will not go to the hospitals. That is something they need to think about." Similarly, another civil society representative argued: "Do you think that if you denounce a family they will come into your office again? Even if the girl is bleeding?" Although most government representatives were in favour of this proposal, some were firm opponents of this proposal. They argued: "our mission is to make sure that women have access to health and we need to make sure that their right of reproductive health is implemented." In addition, they referred to the possible breach of the medical secrecy of health professionals, when they would refer cases to the police. An often-heard counter-argument was: "How do you reconcile a little girl, who has been cut, with her right to health? We need to tackle that."

Apart from the proposed adjustment of the Penal Code regarding the medical professionals, three other proposals were made by the Ministry of Justice to change the current Penal Code. First of all, the Ministry of Justice proposed to introduce an "obligation to report." This means that anyone who had knowledge that a girl is about to undergo FGM/C, but does not notify the administrative or judicial authorities, while this person was in the position to prevent or limit the effects, this person will be punishable (proposed in Article 55 of the Penal Code). In the second place, anyone who abuses its authority intimidates or who influences the decision (for example by gifts and promises) to undergo FGM/C or who gives instructions to undergo the procedure, will be punishable (Article 441 of the Penal Code). Thirdly, the Ministry of Justice proposed that in cases of FGM/C there would not be any limitation periods.

This means that girls can sue their parents, grandparents and cutters when they are grown-up, no matter how long ago the procedure was performed on them.

## 12 POLICIES AND NATIONAL ACTION PLANS

Besides passing a law criminalizing FGM/C, the Republic of Senegal started to develop policies regarding VAW and more specifically FGM/C in the 1990s. It has incorporated provisions to end FGM/C within a broader national policy framework that includes the National Reproductive Health Program (1997-2001),<sup>418</sup> the National Health and Social Development Programme (1998-2007), the National Plan of Action for Women (1997-2001) and the Poverty Reduction Strategy Paper (2006-2010).<sup>419</sup> In 1999, soon after the adoption of the national law criminalizing FGM/C, the government developed the first National Action Plan (NAP) specifically dealing with FGM/C for the period 2000-2005. This NAP was evaluated in 2008 and a new NAP to accelerate the abandonment of FGM/C was adopted in 2010 for the period 2010-2015. Furthermore, a medical policy was adopted in 2011 and a religious policy in 2013. Below, a short overview is given of the main objectives of these national policies.

### 12.1 National policy framework in relation to FGM/C

#### 12.1.1 National Plan of Action for the Abandonment of Female Genital Mutilation

The aim of the 'National Plan of Action for the Abandonment of Female Genital Mutilation' (*Plan d'Action National pour l'Abandon de la Pratique des Mutilations Genitales Feminines*) was to create a strategic framework to coordinate actors working in this field in Senegal to facilitate the end of the practice. The NAP was designed to promote and protect the rights of girls and women and to support the collective abandonment of all forms of FGM/C. The general objective of the NAP was the definitive abandonment of FGM/C across Senegal by the year 2005.<sup>420</sup> The Senegalese government mandated the Direction of the Family (*Direction de la Famille*) of the Ministry of Women, Family and Children (*Ministre de la Femme, de la Famille et de l'Enfance*)<sup>421</sup> to be the coordinating body for the implementation of the NAP.

<sup>418</sup> The National Reproductive Health Program contains a sub-program on FGM/C and VAW, Adolescents and Girls. The general objectives of the program are to "support the struggle to abolish FGM/C and other forms of VAW in order to protect their reproductive health, promote and respect for their fundamental rights and improve their social and economic status." The specific objectives of the program are to reduce FGM/C with 50% in 2001 and to eliminate it altogether.

<sup>419</sup> A. Deme, *Evaluation of Senegal's Implementation of the Regional Plan of Action to Accelerate the Elimination of FGM/C in Africa* (Original in French: *Evaluation de la Mise en Œuvre au Sénégal du Plan d'Action Régional pour Accélérer l'Élimination des Mutilations Sexuelles Féminines en Afrique*), WHO Senegal, 22 September 2003, p. 15-16.

<sup>420</sup> National Plan of Action for the Abandonment of Female Genital Mutilation (Original in French: *Plan d'Action National pour l'Abandon de la Pratique des Mutilations Genitales Feminines*), Ministry of the Family and National Solidarity, March 2001, p. 24.

<sup>421</sup> This Ministry was the time of the adoption of the first National Plan of Action referred to as the Ministry of the Family, National Solidarity and Female Entrepreneurship (*Ministère de la Famille, de la Solidarité Nationale de L'Entreprenariat Féminin*).

The main objectives of the NAP were to improve networking and coordination among actors involved in efforts to combat the practice, explaining the legal framework to them and integrating the issue into formal and non-formal education. The NAP included four main components: (i) 'communication and social mobilization' which aimed to raise awareness of the health and sexual consequences of FGM/C on women and girls, to get people involved to eliminate the practice of FGM/C and to recognize the rights women and girls to physical and moral integrity; (ii) 'formal and non-formal education' to support the integration of FGM/C and the rights of women and girls in health programs and social education in the curricula of elementary, secondary and university education, and in the training programs of the structures involved in the implementation of the law against violence against women and girls; (iii) 'accompanying measures' through which actions would be developed to strengthen the management of psycho-social and medical care for people suffering from the effects of FGM/C and conversion of former practitioners in other income-generating activities to offset income from FGM/C; (iv) 'institutional framework' which aimed to establish frameworks and institutional mechanisms necessary for coordinating and monitoring the implementation of the NAP at all levels.<sup>422</sup> To ensure the achievement of its objectives, the intervention strategy of NAP was based on an approach that focuses on research, community outreach, education, training and structural changes. The strategy was, first, to make communities aware, through information, education and communication, the consequences of FGM/C on the health and physical well-being, mental and social development of girls and women who suffer; and secondly, to bring communities to adopt by consensus a dynamic structural change in favour of abandoning the practice.

The overall budget for the implementation of the NAP amounted to 2.504.970.000 CFA (around 3.818.801 euro). Partners in the international community (WHO, UNIFEM,<sup>423</sup> UNAIDS, UNICEF, UNFPA, USAID, and GTZ,<sup>424</sup> among others)<sup>425</sup> provided technical and financial support to the State and NGOs involved.<sup>426</sup>

<sup>422</sup> National Plan of Action for the Abandonment of Female Genital Mutilation (Original in French: *Plan d'Action National pour l'Abandon de la Pratique des Mutilations Genitales Feminines*), Ministry of the Family and National Solidarity, March 2001, p. 26-73; A. Diop-Diagne, *Evaluation of the National Plan of Action for the Abandonment of Female Genital Mutilation* (Original in French: *Evaluation du Plan d'Action National pour l'Abandon de la Pratique des Mutilations Genitales Feminines*), Ministry of the Family, National Solidarity and Female Entrepreneurship, September 2008, p. 13.

<sup>423</sup> In 2011, United Nations Development Fund for Women (UNIFEM) was merged into the United Nations Entity for Gender Equality and the Empowerment of Women, also known as UN Women.

<sup>424</sup> In 2011, the German organization Gesellschaft für Technische Zusammenarbeit (GTZ) changed its name to Gesellschaft für Internationale Zusammenarbeit (GIZ).

<sup>425</sup> National Plan of Action for the Abandonment of Female Genital Mutilation (Original in French: *Plan d'Action National pour l'Abandon de la Pratique des Mutilations Genitales Feminines*), Ministry of the Family and National Solidarity, March 2001, p. 74-76

<sup>426</sup> A. Diop-Diagne, *Evaluation of the National Plan of Action for the Abandonment of Female Genital Mutilation* (Original in French: *Evaluation du Plan d'Action National pour l'Abandon de la Pratique des Mutilations Genitales Feminines*), Ministry of the Family, National Solidarity and Female Entrepreneurship, September 2008, p. 5.

### 12.1.2 *Evaluation of the National Plan of Action for the Abandonment of Female Genital Mutilation*

The National Plan of Action for the Abandonment of Female Genital Mutilation (2000-2005) was evaluated in 2008 in order to identify strengths and weaknesses of the implementation of the NAP.<sup>427</sup> Ms. Astou Diop Diagne carried out the evaluation under the supervision of the Ministry of Women, Family and Children. According to the evaluation, "Most of the objectives started to be implemented, although the degree of implementation is not the same for every component."<sup>428</sup> There had been "significant results" at the output level with regard to the 'communication and social mobilization' components and 'non-formal education' component.<sup>429</sup> There were "positive effects" on the behaviour and attitudes of communities that were now more favourable to the rights of women, the abandonment of FGM/C and improved the social position of women. According to the evaluators, FGM/C was no longer ignored by the population, but had become more visible through awareness raising and training. It was no longer a taboo and it has been discussed among community members. Even people who practice FGM/C recognized its adverse consequences and, increasingly, they publicly declared their intention not to practice on their children. According to the evaluation, women, men, youth, religious and traditional leaders were all united for the abandonment of FGM/C. Of the 5,000 villages previously practicing FGM/C, a total of 3,140 had publicly declared to abandon FGM/C in March 2008.<sup>430</sup> Although this sounded very promising, the evaluators also reported at the same time that there were still many areas (especially in the North of Senegal and in Vélingara) where FGM/C is still strongly defended. These areas are referred to as "pockets of resistance" causing difficulty for some actors to develop their programs. This resulted in a concentration of actors in the South and an "uneven coverage areas by actors and a difference in the extent of their involvement in the areas covered."<sup>431</sup> Therefore, the objective of increasing the level of knowledge on FGM/C in Senegal was only partially achieved.

The results achieved related to the 'formal education' component and the 'institutional framework' component were weaker. The issue of FGM/C was not (yet) integrated in the curricula of primary and secondary education and those of health training schools. In addition, one of the major constraints was the lack of ownership of the government, including the poor coordination of actors in the implementation of the NAP. The evaluation articulated "The Government, beyond the willingness to accelerate the final abandonment of FGM, must take greater ownership of the implementation of the Action Plan by setting place the institutional mechanisms that will allow it to fully play its role

<sup>427</sup> A. Diop-Diagne, *Evaluation of the National Plan of Action for the Abandonment of Female Genital Mutilation* (Original in French: *Evaluation du Plan d'Action National pour l'Abandon de la Pratique des Mutilations Génitales Femminines*), Ministry of the Family, National Solidarity and Female Entrepreneurship, September 2008, p. 16.

<sup>428</sup> Ibid, p. 35.

<sup>429</sup> Ibid, p. 5 and p. 35.

<sup>430</sup> Ibid, p. 16 and p. 48.

<sup>431</sup> Ibid, p. 6 and p. 21.



of coordination, monitoring and evaluation.”<sup>432</sup> The weak capacity and the institutional changes within the government during the period of implementation contributed to the non-implementation of the NAP. Inadequate resource mobilization (human and financial) for the implementation of the NAP was cited as an additional problem. The evaluators made some recommendations for the State, including the following: (i) to create a National Coordination Committee and regional and departmental committees; (ii) to allocate a budget for the implementation of the NAP to finance the activities of the NAP (iii) to reinforce the authorities' commitment to support the permanent abandonment of FGM/C.<sup>433</sup> The evaluation also recognized the crucial role of CSOs in the implementation of the NAP: “They took over from the government and allowed to have significant results in terms of behavioural change.”<sup>434</sup> The strategy of the CSO Tostan – to promote women’s rights – was referred to as a good and promising practice: “Tostan was now the only CSO working on the ground broadly with potential and strong technical ability with the development of a community education package based on the rights-based approach.”<sup>435</sup> The evaluation stated that the different categories of stakeholders (government, CSOs and communities) recognized that the achievements and results in the field of FGM/C are “largely due to the strategy of Tostan.” They suggested that the Government should capitalize the Tostan program as a national program that will be accessible and usable by all stakeholders to accelerate the abandonment of FGM/C in Senegal.<sup>436</sup> With the evaluation, several ‘lessons learned’ were identified. Two important lessons worth mentioning were that (i) the adoption of a law alone and the Public Declarations are not sufficient to deter people permanently to practice FGM/C;<sup>437</sup> (ii) improving the socio-economic situation of the population could also help in changing behaviour to abandon the practice of FGM/C.<sup>438</sup> The evaluators concluded by saying that although many aspects of the NAP had not been realized as planned and many of the goals developed in the NAP were not achieved, the NAP has improved the situation of FGM/C in Senegal.

### 12.1.3 National Plan of Action to Accelerate the Abandonment of FGM/C (2010-2015)

Drawing lessons from the evaluation in 2008 and the findings of a national and regional workshop in October 2008 on FGM/C,<sup>439</sup> the National Plan of Action to Accelerate the Abandonment of Excision (*Plan d’Action National pour l’Accélération de l’Abandon de l’Excision*) was adopted in February 2010. The

<sup>432</sup> A. Diop-Diagne, *Evaluation of the National Plan of Action for the Abandonment of Female Genital Mutilation* (Original in French: *Evaluation du Plan d’Action National pour l’Abandon de la Pratique des Mutilations Génitales Feminiennes*), Ministry of the Family, National Solidarity and Female Entrepreneurship, September 2008, p. 8.

<sup>433</sup> *Ibid.*, p. 9.

<sup>434</sup> *Ibid.*, p. 42.

<sup>435</sup> *Ibid.*, p. 8.

<sup>436</sup> *Ibid.*

<sup>437</sup> *Ibid.*

<sup>438</sup> *Ibid.*

<sup>439</sup> National Plan of Action to Accelerate the Abandonment of Excision 2010-2015 (Original in French: *Plan d’Action National pour l’Accélération de l’Abandon de l’Excision 2010-2015*), Ministry of the Family, National Solidarity and Female Entrepreneurship, February 2010, p. 26, para. 3.5.

objective of this NAP is to step up action against FGM/C in Senegal with the goal to achieve total abandonment by 2015.<sup>440</sup> The strategy in this NAP focuses on human rights education, community empowerment and capacity building, awareness raising and advocacy, the harmonization of policies and strategies and resource mobilization.<sup>441</sup> The NAP is structured around four main components, including (i) 'extension and national coverage' (ii) 'sub-regional cooperation and diaspora' (iii) 'coordination, monitoring and evaluation' (iv) 'accompanying measures'.<sup>442</sup> In the NAP, activities are listed for every component to further elaborate on what actions are necessary for the total abandonment of FGM/C in Senegal.<sup>443</sup>

This NAP provides also a comprehensive framework for coordination at the national, regional and community level and to establish a monitoring mechanism. The Ministry of the Family, National Solidarity and Female Entrepreneurship, (*Ministère de la Famille, de la Solidarité Nationale, de l'Entreprenariat Féminin*) is still responsible for the implementation of the NAP and must coordinate activities at the strategic and technical level.<sup>444</sup> At the State level, the National Council for Promoting the Abandonment of FGM/C (*Conseil National Promotion Abandon de l'Excision*) will be established, as the political body of guidance and decision. The National Council will be chaired by the Prime Minister and its mission is to guide government actions, validate annual action plans, monitor and evaluate the performance of annual and NAPs and provide advocacy, resource mobilization and partnership at the highest level for the total abandonment of FGM/C.<sup>445</sup> The members of this Council are all actors that are important in the abandonment of FGM/C in Senegal, including the different Ministries, NGOs, women's organizations, religious and customary leaders, communication and press, parliamentarians, technical and financial partners.<sup>446</sup> In addition, a National Technical Coordination Committee will be established (*Comité Technique National de Coordination*) whose task is to assist the coordination unit in its mission, including providing them with the necessary technical assistance.<sup>447</sup> At the regional level, a Regional Committee for the abandonment of excision (*Comité régional pour l'abandon de l'excision*) and a Departmental Committee for the abandonment of FGM (*Comité départemental pour l'abandon de l'excision*) will be established. The missions of the regional and district committees are: (i) to ensure the responsibility for monitoring and supervision of field activities; (ii) interface with international and national financial partners in their region; (iii) promote advocacy on the financial, political, religious and community; (iv) develop performance reports and capitalize on experience.<sup>448</sup> At the community level, there are Community

<sup>440</sup> National Plan of Action to Accelerate the Abandonment of Excision 2010-2015 (Original in French: *Plan d'Action National pour l'Accélération de l'Abandon de l'Excision 2010-2015*), Ministry of the Family, National Solidarity and Female Entrepreneurship, February 2010, p. 15, para. 2.4.

<sup>441</sup> *Ibid.*, p. 15, para. 2.6.

<sup>442</sup> *Ibid.*

<sup>443</sup> *Ibid.*, p. 16-17, para. 2.7.

<sup>444</sup> *Ibid.*, p. 19, para. 3.1.1.

<sup>445</sup> *Ibid.*, p. 20, para. 3.2.1.

<sup>446</sup> *Ibid.*, p. 21, para. 3.2.1.

<sup>447</sup> *Ibid.*, p. 22, para. 3.2.2.

<sup>448</sup> *Ibid.*, p. 22, para. 3.2.3.

Management Committees (*Comités de gestion communautaire*) whose mission is to ensure the protection of girls and women in the community for the effective abandonment of FGM/C.<sup>449</sup> The overall budget for the implementation of the 2<sup>nd</sup> phase of the NAP amounted to 7.613.613.000 CFA (around 11.606.849 euro). An external evaluation of the NAP will be carried out in 2015 by independent consultants at the end of the program. It will aim to analyze the results and make recommendations for the future of the program.<sup>450</sup>

#### 12.1.4 The "Medical Argument"

Although the latest DHS survey shows that the proportion of Senegalese women who reported knowledge about FGM/C is high (91.3%), the practicing communities are often not aware of the harmful consequences and the impact of the practice on the health of women and children. Many Senegalese women don't know exactly what happens when they (or their daughters) undergo FGM/C. Molly Melching, director of Tostan, explains that she interviewed, together with five Senegalese staff members, thousands of women throughout rural Senegal in the 1990. During these interviews, they found out how little these women understood about the workings of their bodies, especially when it came to reproductive health: "They didn't know about family planning or menstruation – when it started and when it stopped. [...] The women had never been taught about healthy sexuality, didn't understand anatomy, and had never seen pictures of sexual organs. Many admitted they wanted to be able to better educate their daughters about these issues, but how could they when they didn't understand their own bodies, when they knew so little themselves?"<sup>451</sup> Furthermore, during the interviews the researchers also discovered that women did not link the pain, hemorrhaging, infection, and problems during childbirth to FGM/C. Rather, they assigned these problems to another cause: the work of evil spirits, a punishment for some unknown transgression of the family or the will of God.<sup>452</sup> As most girls in Senegal are cut at very young ages. Therefore, girls and women spend their entire lives thinking that the problems they suffer are normal and expected, part of what it means to have a female body. However, some women slowly start to realize that "the pain, hemorrhaging, infection, and problems during childbirth were not the result of bad spirits, as they had thought, but rather of being cut with an unsterile razor blade or knife by an elderly women with no medical training."<sup>453</sup> An additional problem in this regard is that women often do not show pain nor talk about the practice, because doing so would only make them appear weak and bring shame to their families.<sup>454</sup> For the rest of their lives it was their responsibility to hold what happens to them in silence, lest they suffer

<sup>449</sup> National Plan of Action to Accelerate the Abandonment of Excision 2010-2015 (Original in French: *Plan d'Action National pour l'Accélération de l'Abandon de l'Excision 2010-2015*), Ministry of the Family, National Solidarity and Female Entrepreneurship, February 2010, p. 23, para. 3.2.4.

<sup>450</sup> *Ibid.*, p. 26, para. 3.3.

<sup>451</sup> A. Molloy, *However Long the Night: Molly Melching's Journey to Help Millions of African Women and Girls Triumph*, HarperOne, 2013, p. 115-116.

<sup>452</sup> *Ibid.*, p. 4.

<sup>453</sup> *Ibid.*, p. 19.

<sup>454</sup> *Ibid.*, p. 65.

punishment. The consequences of talking about the tradition could be quite serious: "It could mean mental illness or paralysis. It might even bring death. This is why women never dared to speak about it."<sup>455</sup>

Although more and more women started to find the courage to speak about the tradition for the first time through the education programmes of CSOs, there is still a lack of knowledge. To tackle this problem in relation to the lack of knowledge, the Ministry of Health and Social Action (*Ministère de la Santé et de l'Action Sociale*) and the Ministry of the Family, National Solidarity and Female Entrepreneurship (*Ministère de la Famille, de la Solidarité Nationale, de l'Entreprenariat Féminin*) adopted the 'Medical Argument about Excision' (*Argumentaire Medical sur l'Excision*) in 2011. The preface of this document states: "It proves essential if we really want to accelerate and sustain the abandonment of excision, it is necessary to share the health consequences of this practice with the communities." This policy document is designed with the aim to facilitate changes in attitudes and expected behaviour.<sup>456</sup> The document is developed in cooperation with different experts and distributed in areas where the prevalence of FGM/C is high. With pictures and drawings, this policy document explains what actually happens when young girls undergo FGM/C. It explains the functions of the female genitals when they are 'normal', the different types of FGM/C and the harmful immediate and subsequent medical and sexual consequences of the procedure.

#### 12.1.5 The "Islamic Argument"

The latest DHS survey in Senegal reveals that 17% of women consider FGM/C as an endorsement of Islam and among women who had undergone FGM/C, 50.6% reported that they believe FGM/C is a religious obligation (see also para. 5.4.9). Despite the fact that FGM/C is an ancient cultural practice that existed before Islam, Christianity and Judaism (see also Chapter II of this thesis), the belief that it is a religious requirement contributes to the continuation of the practice in Senegal.<sup>457</sup> Practicing communities believe that FGM/C provides the cleanliness and purification required for religious participation and prayer. They also put emphasis on its moral merits such as promoting chastity prior to marriage, and having controlled sexuality and fidelity once married.<sup>458</sup>

In November 2013,<sup>459</sup> Senegal's Network of Islam and Population (*Réseau Islam & Population*) issued the 'Islamic Argument for the abandonment of excision in Senegal' (*Argumentaire Islamique pour l'abandon de l'excision au Sénégal*). The Network of Islam and Population is a CSO that brings together a number of experts in the field of Islamic religious doctrine, imams, academic

<sup>455</sup> A. Molloy, *However Long the Night: Molly Melching's Journey to Help Millions of African Women and Girls Triumph*, HarperOne, 2013, p. 115-116, p. 145.

<sup>456</sup> Ministry of Health and Social Action and the Ministry of the Family, National Solidarity and Female Entrepreneurship, *Medical Argument about Excision* (Original in French: *Argumentaire Medical sur l'Excision*), 2011, p. 5.

<sup>457</sup> United Nations Children's Fund, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, UNICEF, New York, July 2013, p. 69.

<sup>458</sup> B. Shell-Duncan et al., *Legislating Change? Responses to Criminalizing Female Genital Cutting in Senegal*, *Law & Society Review*, Volume 47, No. 4, 2013, p. 816.

<sup>459</sup> Since the "Islamic Argument" was very new at the time of this research, it was not possible to include questions in the interview guide about the implementation of this document.

researchers and representatives of the major fraternities and *Marabout* families. The Network works closely together with Ministries and other CSOs and is concerned with issues relating to family planning and birth control. They are deeply committed to abandon FGM/C because "it is one of the causes of maternal and infant mortality in our country." It is for this reason that they want to equip members through knowledge of Islamic law on FGM/C.

This "Islamic Argument" for the abandonment of FGM/C in Senegal provides a tool for actors in the field who are confronted with opposition based on the religious arguments. This document – a small green booklet – gives a response to those arguments and explains that FGM/C is not a practice recommended by Islam. With excerpts from the Qur'an, the document clarifies that FGM/C has never been mentioned in the Holy Qur'an and there are no citations in Prophet Muhammad's Hadith.<sup>460</sup> The Hadith that is often cited by proponents to justify FGM/C, is known as Umm Attiyah's Hadith. It reported that Prophet Muhammad addressed her saying: "كَفَي، نَتَّ وَالْأَمَى شَأْنُ غَطِيَةِ أُمِّ يَاسٍ" (O Umm 'Attiyah, when you do circumcise, restrict yourself to cut a minute part and do not excise. That will be far more pleasant for the wife and satisfying for the husband.") According to another Hadith that is often used in debates about Islam and FGM/C, it is reported that Prophet Muhammad said: "لِلنِّسَاءِ مَكْرَمَةٌ لِلرِّجَالِ سَنَةُ الْخِتَانِ" ("circumcision is *Sunnah* for men and *Makramah* [virtuous deed] for women".) However, in this policy document, the Network explains why these – and other Hadiths referring to FGM/C – are weak and not reliable as evidence for FGM/C.<sup>461</sup> In the second part of the document, the Network relies on medical arguments to explain why the practice is harmful. The Network argues that because of the medical complications, it affects the quality of life of women and as a consequence of the couple.<sup>462</sup> On the contrary, Islamic law protects a women's right to health and that FGM/C violates those rights. Therefore, the Network concludes that there is no text that can serve as a reliable basis to justify FGM/C in the Islam. The practice should therefore be prohibited.<sup>463</sup> The technical and financial support of the UNICEF-UNFPA Joint Programme made the development of this policy document possible.

<sup>460</sup> See also International Islamic Center for Population Studies & Research of Al Azhar University and UNICEF Egypt, *Female Circumcision: Between the Incorrect Use of Science and the Misunderstood Doctrine*, Executive Summary (original published in Arabic), 2013, p. 6, available at [http://www.unicef.org/egypt/Final\\_English\\_FGM\\_summary\(1\).pdf](http://www.unicef.org/egypt/Final_English_FGM_summary(1).pdf) [Last Accessed 1 October 2015]. See also M. Selim Al-Awa, *FGM In the Context of Islam*, International Federation of Islamic Scholars, The National Council for Childhood and Motherhood, May 2012, available at [http://egypt.unfpa.org/Images/Publication/2012\\_05/d9174a63-2960-459b-9f78-b33ad795445e.pdf](http://egypt.unfpa.org/Images/Publication/2012_05/d9174a63-2960-459b-9f78-b33ad795445e.pdf) [Last Accessed 1 October 2015].

<sup>461</sup> International Islamic Center for Population Studies & Research of Al Azhar University and UNICEF Egypt, *Female Circumcision: Between the Incorrect Use of Science and the Misunderstood Doctrine*, Executive Summary (Original Published in Arabic), 2013, p. 8-10, available at [http://www.unicef.org/egypt/Final\\_English\\_FGM\\_summary\(1\).pdf](http://www.unicef.org/egypt/Final_English_FGM_summary(1).pdf).

<sup>462</sup> Network of Islam and Population, *Islamic Argument for the Abandonment of Excision in Senegal* (*Argumentaire Islamique pour l'Abandon de l'Excision au Sénégal*), November 2013, p. 17-18.

<sup>463</sup> *Ibid*, p. 28.

### 12.1.6 Youth policy in progress

At the time of this research, the Ministry of Women, Family and Children was in the process of developing a policy document focusing on the youth. A representative of the government explained “the youth are not used to be involved in the fight against FGM in this country, but they requested to be involved and to take part in the process. We think that they can play an important role.” Indeed, there are several studies<sup>464</sup> that suggest that the youth can help to contribute to the acceleration of the abandonment of FGM/C.

## 12.2 Respondents’ views on policy development

During the interviews, I asked the respondents, amongst others, their opinion about the adopted national policies in the field of FGM/C in Senegal. Many respondents (including representatives of the government, civil society and international organizations) were very critical in relation to the first NAP and they referred to this policy as being “incomplete”, “not successful” and “not well done.” In addition, many respondents explained that only a few people were aware about the adoption and the existence of the first NAP. A representative of civil society said: “It was not very well known by people. Some CSOs never knew about national plan, even if they are working on FGM, even if they are working on gender.” Another representative of civil society said: “Who knows about the National Action Plans? Very few. You know, even myself, I think that when I started working on the concept note, that’s when I discovered that there was a National Plan.”

Many respondents (including representatives of the government, civil society and international organizations) were much more positive about the second NAP. They said that this NAP is “much better” than the first NAP. They referred to the second NAP as “very comprehensive”, “ambitious” and sometimes even “overambitious.” Although it is according to the respondents a very well thought, well-written and comprehensive NAP, that provides a clear framework and structure to tackle FGM/C in the country, many respondents expressed their concern that this second NAP is not implemented. A representative of civil society argued: “It is a well-thought, good and excellent National Action Plan, but the problem is the application.”

The respondents had mixed feelings in relation to the “Medical Argumentaire.” Some respondents (especially government representatives) said this was a very good policy, while others (mainly representatives of civil society and international organizations) did not like the approach taken in this policy document. A representative of an international organization said: “I think it is better to leave the medical *Argumentaire* where it is, you know. I am not sure whether all the pictures that are present in this *Argumentaire* aren’t hurting people.” Some representatives of civil society explained that it is “not respectful” to adopt a policy like this. They explained that it is against “the Senegalese culture” to portray the female genitals as they did in this document.

<sup>464</sup> See for example M. Mottin-Sylla and J. Palmieri, *Confronting Female Genital Mutilation: The Role of Youth and ICTs in Changing Africa*, (Original in French: *Excision: les Jeunes Changent l’Afrique par les TIC*) Pambazuka Press, 2011.

There was also some discussion about the target group of the policy document. Although it is written for the people at the community level, some respondents argued that this policy document would be a good document for the medical sector to inform medical professionals about the consequences of FGM/C (because they often don't know about the practice due to a lack of training on the practice) but not for people at the community level, because of two reasons. The first reason is that it might be a disrespectful policy and the second reason is that "many people won't understand this medical *argumentaire*." The language used and the wordings would be too complicated, according to some experts (for a similar argument with regard to the law, see also section 10.6).

### 12.3 Why policies were adopted

During the interviews, I explored the views of the respondents, amongst others, why policies in the field of FGM/C have been adopted in Senegal. For some respondents, it was a "logical step" after the adoption of the law. A civil society representative explained: "When you have a law, you also need to have a National Action Plan to apply what you have in the law. Because a law is like a way of making people understand but in practice you need to operate that. That is why we have the National Action Plan." The respondents explained that there are several reasons behind the adoption of the law, which are described in the sections below.

#### 12.3.1 *Political will*

Some respondents (including representatives of the government, civil society and international organizations) mentioned the political will of the Senegalese government to take further action. A government representative explained: "It was the will of the government to fight against violence against women and to take action against FGM. That is why the policies are adopted." A representative of an international organization explained: "There was first the law and with the law there was a commitment to take more action." A civil society representative explained: "The adoption of the National Action Plan was a way for the government of Senegal to show its commitment."

#### 12.3.2 *Support of UN agencies*

Many respondents (including representatives of the government, civil society and international organizations) argued that the adoption of the policies was linked to "donor willingness to fund the issue." A representative of civil society explained in this regard: "I must say we have very active UNICEF and UNFPA here in Senegal." Another civil society representative said: "It was pressure from the donors." Respondents explained that several UN organizations were actively involved in policy development and pushed for the NAP, especially UNIFEM<sup>465</sup> at that time and the UNFPA-UNICEF Joint Programme. A government representative acknowledged: "The Joint Programme helped us a lot in realizing this National Action Plan and to make it a success." A representative of an international organization took it a step further and argued:

<sup>465</sup> At the time of the adoption of the NAP, the organization was still referred to as UNIFEM.

“It should be a government document, but that is not the case now. This Action Plan was an effort of the UN partners.”

### 12.3.3 Meeting of the Inter-African Committee

Some respondents (representatives of civil society and the government) also referred to a meeting about FGM/C in 2001 organized by the IAC in Dar-es-Salaam, Tanzania as one of the triggers for the Senegalese government to develop a NAP on FGM/C. A government representative explained: “When they came back, they said that we need to develop a National Action Plan on FGM.”

### 12.3.4 Support of CSOs

Many respondents (including representatives of the government, civil society and international organizations) argued that the policies were adopted because of the work of CSOs<sup>466</sup> that put effort in developing the policies (in cooperation with the UNICEF-UNFPA Joint Programme and the Ministry of Women, Family and Children). This also relates to the fact that the second NAP has clearly a more human rights-based approach compared to the first NAP. After the evaluation, the work and experience of CSOs in the field was taken into account, especially when the second NAP was developed.

I also explored during the interviews, the views of the respondents, amongst others, what the reasons are for more emphasis on the human rights-based approach in the second NAP. Respondents (including representatives from the government, civil society and international organizations) explained that this human rights-based approach is mainly nourished by the experiences in the communities of the CSO Tostan and the recommendation that followed from the 2008 evaluation to adopt the Tostan approach towards abandoning FGM/C as a national strategy. One can clearly see that for example in the guiding principles of the NAP, where reference is made to the social convention theory and the “organized diffusion” model of Schelling – the theory behind the Tostan program (see also Chapter III).<sup>467</sup> The vocabulary used to refer to the practice in the second NAP also hint in the direction of the non-judgmental Tostan approach.<sup>468</sup> In the first NAP, the term “*Mutilations Genitales Feminines*” (Female Genital Mutilation) was used throughout the document, while in the second NAP the term “*Excision*” (Excision) was utilized. In the introduction of the second NAP, the Ministry of Women, Family and Children stated: “Senegal

<sup>466</sup> Among them are COSEPRAT, TOSTAN, Enda Action en Casamance, branche d'ENDA SYNFEV, le Réseau des Parlementaires en Population et Développement, le Réseau des Journalistes en Population et Développement, le Réseau des Communicateurs Traditionnels, l'Association Sénégalaise pour le Bien-Etre Familial (ASBEF).

<sup>467</sup> National Plan of Action to Accelerate the Abandonment of Excision 2010-2015 (Original in French: *Plan d'Action National pour l'Accélération de l'Abandon de l'Excision 2010-2015*), Ministry of the Family, National Solidarity and Female Entrepreneurship, February 2010, p. 14, para 2.2.

<sup>468</sup> According to Molly Melching, the director of the CSO Tostan, they refer to the practice as Female Genital Cutting (FGC) and not Female Genital Mutilation (FGM), because “You want to open doors to dialogue, not close them. You want to be humble in this, you want to learn from people, you want to listen people and you want to say things that will not make them angry and defensive. If you want to dialogue on change, you have to approach people in a way that is respectful and non-judgmental.”



does not consider this phenomena as a mutilation, but rather as a social norm adopted by communities that should now stop. The accepted term in the action plan will be 'excision'.<sup>469</sup> Reference to the 'social norm' also indicates the influence of Tostan in developing this NAP. Respondents confirmed that the experiences from the field rather than the international and regional human rights instruments directly resulted in a more human rights approach in the second NAP. A representative of the government explained: "When we evaluated the first NAP, we found out that the human-rights approach, like the Tostan approach, is a very good approach. They gave a lot of information and had a lot of result. And that's why government adopted the human rights approach." A representative of civil society said: "When I went to the village, in regions where the prevalence is high, I saw that the human rights approach is a good approach. [...] I saw the work of Tostan, and I found it a good approach." A representative of an international organization said: "I saw the approach of Tostan during my research in the field. It is a good approach and I said that we should also adopt it in the National Action Plan to fight FGM." A representative of civil society explained: "They realized that you cannot force people to change their habits. Unless they understand it is fair, that it is the way it should be. That is nice about the human rights approach. It allows people to put themselves in a position of thinking: Is this right? Is this fair? Is this useful? They are in charge." However, some respondents emphasized that the human rights-based approach was not only adopted by Tostan, but also by other CSOs like COSEPRAT, Enda Action, ASBEF and FAWE. Their experiences were taken into account as well, when the second NAP was developed, according to these respondents. A representative of civil society added to that: "You can only have a good policy with a good result, if you have gathered information from the field: the bottom-up approach. These are always the success stories. Go to communities; take a look at the perceptions of the people living in these communities, what they think, work out solutions with them. That is the key for a good policy." For this reason many respondents were of the opinion that this NAP is a much better policy document compared to the first NAP. When the first NAP was developed, there was more a top-down approach while when developing the second NAP the government listened better to the experiences of CSOs in the field.

### 12.3.5 Influence of the Human Rights Framework

The first NAP made a clear reference to the international human rights framework and refers to FGM/C as a form of violence against women and a violation of human rights. In the NAP is written: "A large number of declarations and conventions at the international level clearly condemn FGM/C."<sup>470</sup> Subsequently, the following instruments are mentioned: CEDAW, CRC, Declaration on the Survival, Protection and Development of Children

<sup>469</sup> National Plan of Action to Accelerate the Abandonment of Excision 2010-2015 (Original in French: *Plan d'Action National pour l'Accélération de l'Abandon de l'Excision 2010-2015*), Ministry of the Family, National Solidarity and Female Entrepreneurship, February 2010, p. 7.

<sup>470</sup> National Plan of Action for the Abandonment of Female Genital Mutilation (Original in French: *Plan d'Action National pour l'Abandon de la Pratique des Mutilations Génitales Femminines*), Ministry of the Family and National Solidarity, March 2001, p. 13.

(World Summit for Children 29-30 September 1990), Resolution 1992/251 of the Economic and Social Council on Traditional Practices Effecting the Health of Women and Children (E/1992/103), Declaration and Programme of Action of the World Summit for Social Development, Cairo Declaration and Programme of Action, African Charter on the Rights and Welfare of the Child, OAU Declaration on the African Plan of Action concerning the Situation of Women in Africa, Beijing Declaration and Platform for Action. The 1997 Joint Statement against FGM/C by the WHO, UNICEF and the UNFPA<sup>471</sup> is also mentioned in the NAP.<sup>472</sup> In the second NAP, there is no direct reference to international or regional treaties, but it states that FGM/C is a violation of the rights of girls and women.<sup>473</sup> Interestingly, this second NAP refers to the Millennium Development Goals (MDGs) and explains: "this NAP is fully in line with the objectives of the MDGs [...] to ensure that girls and women are protected against abuse, violence harmful practices."<sup>474</sup> This is the only reference to the human rights framework (CEDAW, CRC nor the Maputo Protocol are being mentioned – as was the case in the first NAP).

Although this explicit reference to the human rights framework in the NAPs indicates that there is a link between the adoption of the NAPs and the human rights framework, I explored during the interviews the views of the respondents, amongst others, if the human rights framework had any influence on the adoption of national policies in the field of FGM/C in Senegal. The respondents gave a rather mixed picture during the interviews. Some respondents (including representatives from the government, civil society and international organizations) argued that the human rights framework did not have much influence on the adoption of the national policies. When answering this question, a representative of an international organization explained: "No, no, no, the international laws had no influence on developing our action plans. It was just the development in Senegal. I don't believe it was influenced by the international laws." Similarly, a government representative argued: "It was coming from the inside."

However, the majority of respondents (including representatives from the government, civil society and international organizations) argued the opposite. They were of the opinion that there is a clear link between the adoption of the national policies and the human rights framework. They explained that according to them, the national policies must be seen as a way of implementing the human rights framework. A government representative argued: "There is a link, a very clear link between the policy actions in Senegal and the UN conferences to increase the promotion of human rights. It will be very difficult to fight for human rights nationally, if we don't have a global action in the

<sup>471</sup> World Health Organization, *Female Genital Mutilation: A Joint WHO/UNICEF/UNFPA Statement*, WHO Library, 1997.

<sup>472</sup> National Plan of Action for the Abandonment of Female Genital Mutilation (Original in French: *Plan d'Action National pour l'Abandon de la Pratique des Mutilations Genitales Feminines*), Ministry of the Family and National Solidarity, March 2001, p. 14.

<sup>473</sup> National Plan of Action to Accelerate the Abandonment of Excision 2010-2015 (Original in French: *Plan d'Action National pour l'Accelération de l'Abandon de l'Excision 2010-2015*), Ministry of the Family, National Solidarity and Female Entrepreneurship, February 2010, p. 4.

<sup>474</sup> Ibid, and p. 14, para. 2.1.

world. It would be very difficult. Because now we have a Resolution of the UN who ask to the country to make a National Action Plan. And that's why we have a national movement." A representative of civil society explained: "Definitely the human rights framework has influenced the adoption of national policies. Because as I told you, the Senegalese government is very keen to obey to international human rights standards." Another representative of civil society said: "When you ratify an international law, you are obliged to respect the international law. When you respect the international law, you need to applicate it, you need to make policies." A representative of civil society argued: "It is the UN and it is also the African Commission for Women's Rights of the African Union that is monitoring the Women's Rights Protocol. Senegal is getting into conformity with their human rights engagement and with the documents that we signed."

#### 12.4 Implementation of policies

During the interviews, I explored the views of the respondents, amongst others, whether the national policies against FGM/C are well implemented. Unfortunately, all respondents – including representatives of the government – answered "no" to this question. Although the policies (especially the NAPs) have much potential in relation to coordination of actions in the field of FGM/C in Senegal, they are – according to all respondents – not well implemented.

A civil society representative said: "It is very good to write documents and plans, but it is better to act in reality. I am disappointed with this plans without real results in reality." A representative of an international organization said: "In general, the Senegalese government has a Plan of Action on anything possible. On child abuse, on sexual exploitation, on commercial exploitation, everything has a National Action Plan. Very well done and comprehensive, but zero implementation most of the time." Although the new structure described in the second NAP sounded very promising in theory, in reality there are many problems with regard to the implementation of this structure at different levels. At the time of this fieldwork, the National Council nor the National Technical Committee was operative and their first meetings did not take place. A representative of civil society argued: "Yes, the legal paper to establish the Council has been signed. But they never had the first meeting." A representative of an international organization said in this regard: "the main improvements could be made be on coordinating the efforts. That's for sure. Everyone is working in his or her own church. We tried to put together this National Coordination Committee, but it never worked, it never worked." At the department level, only few departments have established a monitoring committee, but these departmental committees "have been dysfunctional for many years" or "have disappeared," according to some representatives of civil society and international organizations. When I asked why that was the case, they referred to the limited capacity and the problem of leadership at the national level. According to some respondents (mostly representatives of international organizations), this National Coordination Committee should "rear and prioritize."

The Government does not allocate a budget for the implementation of the national policies, which is, according to the respondents a "another major

problem” and seen as “a lack of government commitment.” A representative of an international organization explained: “When you work with the government, you need to have some policy and some framework within which you are working. So it’s a beginning, but it’s not the end. And unfortunately sometimes they put so much effort in making the policy, writing the policy that in the end there is no money to implement the policy. I think that this is more the issue.” A representative of an international organization explained: “We just hope that government will be more involved by putting funds for implementing this plan because that is very very needed.” A representative of civil society said: “The government of Senegal needs to put more money in it, because most of the activities are funded by partners of the Senegalese State and for me that’s not good.”

Although there was lots of criticism on the lack of implementation of the NAP, some of the respondents also saw the NAP as a useful tool in terms of potential for coordination and in terms of identifying priority strategies and action: “You cannot work just like that. You need to have a policy and some framework within you are working.” A representative of an international organization said: “I think it was a big step for Senegal to have this NAP.” Another representative of an international organization said: “We note a lack of implementation, but we cannot say that it is not useful. It is always useful to have a framework. It is like a guide to show the way. It is important.”

### 13 ROLE OF THE GOVERNMENT

During the interviews, I explored the views of my respondents regarding, amongst others, the role of the Senegalese government in the abandonment of FGM/C in Senegal.

#### 13.1 Government commitment

The Senegalese government stated in many documents (in the reports to the TMBs, during the UPR rounds, in the NAPs, etc.) that tackling FGM/C in the country is a major priority and that the Government is very committed to end the practice. In the second NAP for example, they articulated: “The State of Senegal strongly expressed its will to protect girls and women against all abuses and violence of any kind through the ratification of international conventions and instruments.”<sup>475</sup> The Senegalese government often refers to the adoption of Law No. 99-05 of 13 January 1999, the adoption of the NAPs and other policy documents to show that they have translated this commitment into concrete action. The evaluation of the UNFPA-UNICEF Joint Programme stated the following: “the Senegalese government has played an active role in the activities for the abandonment of FGM/C, especially at the Ministry of Women,

<sup>475</sup> National Plan of Action to Accelerate the Abandonment of Excision 2010-2015 (Original in French: *Plan d’Action National pour l’Accélération de l’Abandon de l’Excision 2010-2015*), Ministry of the Family, National Solidarity and Female Entrepreneurship, February 2010, summary p. 2.

Children Female Entrepreneurship, particularly within the Department of the Family.”<sup>476</sup>

During the interviews, I explored the views of my respondents regarding, amongst others, whether FGM/C is a priority for the Senegalese government. Some respondents (mostly government representatives) explained that there is political will at the national level to promote women’s rights and to abandon FGM/C. A government representative said: “Although FGM is not our most important priority, it is a priority. It is a priority because we can’t have sustainable development in Senegal if 26% of the female population lives with this kind of practice. The government want to resolve this problem. Therefore we have a law against FGM, we have the National Action Plan, and we have many actions. We organize workshops, we support NGOs, and we coordinate all the actions of the NGOs and civil society.”

However, at the same time, the majority of respondents (mostly representatives of international organizations and civil society, but also some representatives of the government) stated that they do not see the commitment of the Senegalese government to act against FGM/C in reality. A representative of civil society said: “adopting the law and developing policy documents is not enough, the government should do more.” Another representative of civil society argued: “The government say that they work hard, and every time they say: We do this, we do that, but I don’t see the result. I really don’t see a result that tells me that the government did an activity with a result.” Many respondents indicated that it is good to have a social movement, CSOs who are doing a lot of capacity building, awareness raising, sensitization, but at the same time they argued: “you need also to have an institution, the Ministry, that takes responsibility.” According to many respondents, the Ministry of Women, Family and Children is not taking this responsibility. Interestingly enough, not all government representatives were of the opinion that FGM/C is a priority for the Senegalese government at this moment. One government representative said: “No, no, no, I don’t think so. Violence and the rights of women is a priority, but FGM is not. Another government representative stated: “FGM is not a priority for our government at this moment. We didn’t make a budget in our plans for next year for FGM.”

### 13.2 Lack of capacity at the Ministry of Women, Family and Children

As was also highlighted in the 2008 evaluation of the NAP, there is a lack of leadership at the national level with regard to the abandonment of FGM/C in Senegal. The Ministry of Women, Family and Children does not fully play its role with regard to coordination, monitoring and evaluation of interventions for the abandonment of FGM/C in Senegal. Why is there no framework for coordination yet and why is the Ministry not properly functioning? The main

<sup>476</sup> United Nations Population Fund and United Nations Children’s Fund, *Joint Evaluation of the UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change (2008-2012) – Senegal* (Original in French: *Évaluation Conjointe du Programme Conjoint UNFPA-UNICEF sur les Mutilations Génitales Féminines/Excision: Accélérer le Changement (2008-2012) – Sénégal*), New York, July 2013, p. 12.

answer to this question is the lack of capacity at the level of the Ministry of Women, Family and Children. During the interviews, this Ministry was often referred to as being very weak. A representative of civil society said: "It's probably one of the weakest ministries we have in Senegal" another representative of civil society stated more firmly: "they are just a mess, no one has any faith in them."

### 13.2.1 Lack of human resources

Many respondents (including representatives of civil society and international organizations) argued that there is a lack of human resources. The Department of the Family is within the Ministry of Women, Family and Children responsible for the FGM/C agenda. However, there is only one person at the Department of the Family appointed for FGM/C, but this person has a lot of additional tasks. One representative of an international organization said: "One person is responsible for the monitoring committee on FGM/C, the monitoring committee on child protection and the monitoring committee for women's issue and mobilization, which is just crazy because it's the same person." According to some respondents, there is not enough time and not enough people at the Ministry of Women, Family and Children to work on the issue of FGM/C. To tackle this problem, UNICEF decided in the summer of 2013 to reinforce the capacity of the Department of the Family by offering one UNICEF employee to work fulltime at the Department of the Family to push the agenda on FGM/C forward. However, this is only a temporary measure. A representative of an international organization explained: "Since she is there, things are moving forward." However, a representative of civil society took this measure of UNICEF as an example to show that FGM/C is not a priority for the Senegalese government: "As the government, you should not have a consultant. You should have staff at the Ministry taking care of the topic. For me, it shows that FGM is not a priority for our government at this moment. But because FGM is a priority for UNICEF, they pay the consultant and support this person, they reinforce the capacity of the Ministry, but the money comes from UNICEF."

The head of the Department of the Family (*Directrice de la Famille*) is ultimately responsible for the FGM/C agenda at the government level. During the interviews, respondents often referred to Ms Ndèye Soukèye Gueye, who was the head of the Department of the Family for a long time. Many representatives of civil society and international organizations praised her for the role she played during her term at the Ministry. A representative of civil society said: "She was an advocate and activist. She speaks with the women as a mother. She was an extraordinary person, very engaged." Another representative of civil society said: "She was highly supportive. She came to all the Declarations since the first one in Malicounda Bambara."<sup>477</sup> It was unbelievable."

Unfortunately, since Ms Ndèye Soukèye Gueye left, there is a lot of instability at the Ministry of Women, Family and Children. Also at the time of this research, someone took over the position of the *Directrice* (who was in that position for less than a year). A problem indicated by the representatives of civil

<sup>477</sup> See also section 11.3.5 of this Chapter.

society was that because of the institutional instability, they “cannot really work and make progress.” A representative of civil society explained: “Every new *Directrice* takes her time to get acquainted with the different programmes at the Ministry.” Apart from the changes in this position, an additional problem that many respondents directed to is the skills, expertise and knowledge of the current head of the department. A representative of civil society said: “This *Directrice* does not have experience. That is an extremely important problem.” A representative of an international organization said: “They have just maybe sometimes lack of skills sometimes of expertise because we have to be honest and to say also if we see in terms of personnel in place, people appointed in the Ministry, sometimes they have not the skills needed to implement this kind of strategy or plan. That is also the problem. That is one of the reasons.” A representative of civil society said: “I think that the current *Directrice* was a dentist or whatever. For me, you know, she doesn’t know much about women’s rights. [...] I think they have been selected just because the President thinks that they can bring votes. I don’t feel that they are really interested in women’s issues.” The Ministry of Women, Family and Children was during the interviews often referred to as a very political Ministry. A representative of civil society explained: “There is a lot of nepotism at the Family Ministry. When the government changes, then they named someone that they are friends with.” Some respondents explained that there are at the same time highly knowledgeable, engaged and professional persons working at the Ministry of Women, Family and Children, but they are often not at the key positions. A representative of civil society explained: “People who are working at important positions at the Ministry of the Family are not chosen because of their qualities. They are chosen because they have the right surname or political colour. They know the right people.” Several respondents (including representatives of civil society and international organizations) expressed their will that this needs to change urgently: “We need to put the best persons at the right place.”

### 13.2.2 Lack of financial resources

Many respondents (representatives of civil society and international organizations) explained that there is a lack of government commitment in terms of financial resources. The National Plans of Action are for example totally unfunded by the Senegalese government, which show (according to some representatives of civil society and international organizations) that the issue of FGM/C is not really a priority. A representative of an international organization said: “They haven’t put one cent in this National Action Plan.” The 2008 evaluation of the NAP also recommended the State to allocate a budget for the implementation of the NAP to finance the activities of the NAP.<sup>478</sup> However, at the time of this research there was still no budget of the government allocated to FGM/C.<sup>479</sup> A representative of civil society said: “There are no

<sup>478</sup> A. Diop-Diagne, *Evaluation of the National Plan of Action for the Abandonment of Female Genital Mutilation* (Original in French: *Évaluation du Plan d’Action National pour l’Abandon de la Pratique des Mutilations Génitales Femminines*), Ministry of the Family, National Solidarity and Female Entrepreneurship, September 2008, p. 9.

<sup>479</sup> Although there were some indicators that the Senegalese Government would be more involved in terms of funds in 2014.

funds or financial resources going from the government to programmes on FGM." Another representative of civil society said: "The Ministry does not give any money to FGM. The government should do more and add money to the Joint Programme. I do advocacy for this every year. [...] But every time when I do advocacy in the Assembly, to the Deputy, to have a budget for FGM, they say to me that FGM is not a priority." Another representative of civil society said: "It's UNICEF and UNFPA who are pushing the FGM agenda. They give them [CSOs, red.] funding to do the campaign, but I am not sure that if they [UNICEF and UNFPA, red.] weren't giving the funding, they [the Senegalese government, red.] would care about that campaign."

### *13.2.3 Need to restructure the Ministry of Women, Family and Children*

Some respondents suggested that it would be necessary to restructure the Ministry of Women, Family and Children completely. To illustrate why this would be necessary, these respondents gave the following example. Within the Ministry of Women, Family and Children, there is the Department of Gender (*Direction de l'Équité et de l'Égalité du Genre*), and the Department of the Family (*Direction de la Famille*). The department of Gender is responsible for the VAW agenda, while the department of the Family is responsible for the FGM/C agenda. One representative of an international organization said: "This is nonsense, you cannot have two separate departments responsible for two issues that are so linked to each other. FGM/C is a form of violence against women!" A representative of civil society added to that: "They are doing the best they can, but you see, the problem is that a lot of people forget that Female Genital Cutting is a form of violence against women. And the Ministry of Family is in charge of Female Genital Cutting. The fight against women's violence is spread among other Ministries. That's a problem. There is a Direction also who takes care of gender issues. It's another Direction. So I believe that if all the resources were put together. What I mean by resources is human resources; financial resources; strategic orientations were put together, we would be more efficient."

### *13.2.4 Need for more outreach to communities*

Another often-heard criticism during the interviews regarding the role of the government was that government representatives do not frequently go to the communities in rural areas where FGM/C is practiced. Although some parliamentarians visited areas where there is a high prevalence of FGM/C to talk to the communities, and representatives of the Ministry of Women, Family and Children attend Public Declarations organized by Tostan, many respondents (mostly representatives of civil society) felt that government action should focus more on the community level. Representatives of civil society referred often – quite frustrated – to meetings or workshops organized by the government to talk about FGM/C "in wonderful hotels in Dakar or Saly," while they could not see how this would directly help the communities on the ground. A representative of civil society said: "I am sorry to tell you that, when I look at these one, two, three day meetings in Saly in a very comfortable place or hotel, to talk about FGM... For me it's nonsense. They better take this money and try to do something good with it. But really, these meetings are nonsense." Another representative of civil society said: "The government sometimes do some



training, organize some meeting in nice and expensive hotels in Dakar [...] but why to stay in Dakar? They must do more prevention in the rural area." Another representative of civil society said: "I was for 6 years in the field. I haven't seen the Ministry coming with the Action Plan and saying: "Hey guys, this is what we have to do." They are sitting in their offices and asking people to send them data." A representative of civil society stated: "When I was writing the report of CEDAW, they [the Ministry of the Family, red.] informed me that they have visited this village: "I have visited that community, I have travelled in the country, it is good." No, it is not. They have to do more and work hard now for the NAP. And if you don't work hard, you don't have result." More representatives of civil society referred to the visits of the government representatives in the field 'for the record', without being really engaged. One representative of civil society explained: "They just came and they just make a record, like: "Okay we came for this one day and its fine" and they keep their things and they go out and move." However, government representatives did not agree with this critique and explained: "We are working a lot in the field, we help NGOs. We work together."

### 13.3 Cooperation with other Ministries

Although the Ministry of Women, Family and Children is designated to be responsible for the issue of FGM/C at the State level, and must coordinate activities at the strategic and technical level, some respondents (including representatives of the government, civil society and international organizations) explained that other Ministries can also play an important role in abandoning FGM/C in Senegal. In the preface of the second NAP, Ndeye Khady Diop writes that "The road to success is through concerted intersectional action of various Ministerial departments involved in the scourge."<sup>480</sup> However, in the NAPs no real attention is given to the responsibilities of other ministries and their role in the abandonment of FGM/C in Senegal. Although the Ministry of Health and the Ministry of Education are sometimes organizing activities for promoting the abandonment of FGM/C, their actions are not coordinated and they do not work in partnership. A representative of an international organization said: "They should collaborate more, have joint programs together and exchange knowledge." A representative of civil society explained: "I am not sure that you can decide to just put it in one place, in one Ministry and say: that's it. I think it really has to be on top of priorities of a couple of Ministries at least." Certainly, the practice of FGM/C has implications on many Ministries. According to the respondents, the following ministries could also be relevant in the abandonment of FGM/C:

- Ministry of Health and Prevention (*Ministère de la Santé et de la Prévention*)
- Ministry of National Education (*Ministère de l'Education Nationale*)
- Department of Justice Department of Criminal Affairs and Grace

<sup>480</sup> National Plan of Action to Accelerate the Abandonment of Excision 2010-2015 (Original in French: *Plan d'Action National pour l'Accélération de l'Abandon de l'Excision 2010-2015*), Ministry of the Family, National Solidarity and Female Entrepreneurship, February 2010, p. 5.

- (Ministère de la Justice/Direction des Affaires criminelles et de la Grâce)
- Ministry of Interior / Governors of target regions (*Ministère de l'Intérieur /Gouverneurs des régions cibles*)
- Ministry of Youth, Sports and Recreation (*Ministère de la Jeunesse, des Sports et des Loisirs*)
- Ministry of Economy and Finance / Budget Department (*Ministère de l'Economie et des Finances/Direction du Budget*)
- Ministry of Information and Communication (*Ministère de l'Information et de la Communication*)

Since the coordination of the different actors (at the government level, but also at the regional and community level) proves to be very problematic, several representatives of international organizations and civil society explained that they were pushing for the establishment of the National Council for Promoting the Abandonment of FGM/C (*Conseil National Promotion Abandon de l'Excision*). One representative of an international organization said: "Perhaps this Council can in the future rear and prioritise and determine stronger government commitment." A representative of civil society said: "The National Council on HIV in Senegal that was established earlier is doing a wonderful job in terms of coordinating all activities regarding HIV. This Council can have the same promising results." The current Prime Minister, Aminata Touré, will be the chair of this Council, which could be a contributing factor, since many respondents were positive about her. A representative of civil society said: "We have great hopes with her." Another representative of civil society said: "She was in the Gender Department in the United Nation structure. So, she knows the link between human rights, women rights and development. She's really pushing the human rights agenda. She did that when she was in the Ministry of Justice and now as the Prime-Minister."

## 14 ROLE OF CIVIL SOCIETY ORGANIZATIONS

During the interviews, I explored the views of my respondents regarding, amongst others, the role of CSOs in the abandonment of FGM/C in Senegal. I also explored how their work in the field of FGM/C relates to the role of the government. Respondents explained that the role of the government is "supervision and coordination." Since CSOs are the "ones who work in the field" their role is "to sensitize the community, to help the communities, to give information to the communities."

### 14.1 CSOs do most of the work

All respondents (including representatives of the government, civil society and international organizations) explained that they consider the work of CSOs in the communities important. A representative of civil society said: "Generally, I think, civil society organizations are very, very important." A representative of the government said: "Civil society do a lot of important work in the field of FGM." A representative of an international organization said: "NGOs are next to the communities, they are very important." Another representative of an international organization said: "I think civil society organizations have an

important role to play. If we are talking about the awareness campaign, sensitization on FGM, civil society has a big role. Our government does not do these kind of things." A civil society representative explained: "Without the NGOs, the government cannot do anything." Another representative of civil society said: "Most of the work is done by NGO's and associations. They go in the field, in the village, and do the job. I never saw somebody working for the government going in the villages, sensitizing and talking to the population. It's only the NGOs and associations who work in the field." Many respondents (including representatives of the government, civil society and international organizations) explained that CSOs do "most of the work" in the field of FGM/C in Senegal. A civil society representative explained: "In communities, NGOs are doing the implementation, instead of the State." A representative of an international organization explained: "The Ministry of the Family is in the lead to coordinating the NAPs, but it is all the NGOs who work hard." A representative of civil society said: "The work of civil society organizations reflects actually the work of the government, which is trying to eradicate the practice FGM." A representative of the government explained: "Civil society does a very good job on FGM. People who abandon FGM in the village, it is not because of the government, but because of the civil society who worked a lot in the field. They make the result."

#### **14.2 No recognition or support from the Government**

The majority of respondents (including representatives of civil society and international organizations) answered "no" to the question whether the government recognizes the role that CSOs play in the movement to eradicate FGM/C. They explained that the government does not give CSOs all necessary (financial) support and encouragement. Even a representative of the government said: "One of the roles of the government is to support civil society. But as we know in this country, the government does not do this. We don't have enough money. The government does not support them." However, another government representatives argued: "The role of the Ministry is to coordinate and to supervise, not to give money to NGOs. The NGOs have their own financial partners."

#### **14.3 No cooperation between CSOs**

Although all respondents were positive about the work of CSOs in the field of FGM/C in Senegal, an often-heard critique (from representatives of the government, international organizations, but also from civil societies themselves) during the interviews was that CSOs do not work together. Although all CSOs have the same goal, namely abandoning FGM/C in Senegal, they do not cooperate with each other. This is, according to some respondents, not efficient and hampering their cause. A government representative also said: "Civil societies are not working together. That is a real problem." A representative of civil society said: "Many organizations are working alone. But it is not profitable for anyone. It is better for them to work together." Another representative of civil society explained: "The problem is that there is no collaboration between the civil society organizations. Sometimes they are... like

competitors. There is competition. And it should not be like this. They should work together, organize things together and try to find solutions together on their daily activities.” Some respondents answered on my question whether CSOs are working together in the field of FGM/C in Senegal: “No, no, no, of course not!” Especially the *of course* was striking to note. A representative of civil society explains: “The coordination with the other NGOs is a problem. There is no coordination among NGOs. Nobody is working together. People sort of... It’s like they are in competition rather than being working together for a common goal. Organizations are putting down other organizations. It was not possible to work together. It was very difficult, because everybody was so busy, into their own activities. It has been a shame really that all of the different organizations in the field of FGC spent more time on denouncing other organizations rather than working on solutions.”

Another civil society representative further explains: “I think that in the beginning there were certain NGOs, who were at the forefront of the movement. And I think they were really possessive, they felt anxious of other NGOs who also came along in the FGM movement.” Another civil society representative explains that there is not so much cooperation between CSOs in the field of FGM/C, because each and every organization has a “specific approach that is different from the others.” Different organizations in the field have different approaches to end FGM/C. A civil society representative said: “I can only cooperate with people who share the same values of respect and giving information and who have the same approaches towards the practice. [...] It is hard for me to cooperate with someone who does just the opposite and does not believe in our approach.” However, it is very problematic that every organization is convinced that their approach is the best approach and they work next to each other. As a result, a civil society representative explained that in areas where the prevalence is high and several CSOs are working, the region is divided: “Each organization has its own area of intervention.” This means that there are “Tostan-villages” where the CSO Tostan is working on their programmes and other villages where other CSOs are working on theirs. A representative of civil society explained: “Jealousy is a problem. Organizations are jealous because some organizations receive a lot of funding and others don’t.”

#### 14.4 CSOs do not always play their role

Another critique (from representatives of the government, international organizations, but also from civil societies themselves) during the interviews was that CSOs do not always play the role they need to play, but tend to act or behave like they are the government. A representative of civil society argued: “Civil society organizations are very important, but the thing I sometimes regret is that most of the time they are not playing their civil society role. You know. They don’t play their role as a civil society. [...] You really need the civil society in Senegal, because here you have a very weak State structure. They are very complementary to State actions. But at the same time it is not good that they don’t play their civil society role, but sometimes the role of the State, of the governmental structure. There is a lack of capacities at the national level, but at the local level it is even worse. At these local levels you have these NGOs with

resources: human resources and financial resources. Sometimes they are even realizing infrastructure. You can imagine that they can be very influential at the local level. This is what I mean. And then it's very difficult for a State and for the local government, to play very fairly its role. So this is an issue. It's very complicated. Sometime they resolve problems that State should resolve." Another civil society representative explained: "Civil society plays many roles, but they also have to know their place and stay on that place. Because civil society is not the government. Civil society needs to be patient, not impatient. Sometimes we see civil society who is thinking more like a government than civil society. They should know that they are not the government. Civil society is here for the society that why we say "civil society", so they need to work for the community."

## 15 ROLE OF THE UNFPA-UNICEF JOINT PROGRAMME

During the interviews, I explored the views of my respondents regarding, amongst others, the role of the UNICEF-UNFPA Joint Programme in the abandonment of FGM/C in Senegal. Before the views of the respondents are given, some background information is provided below on the UNFPA-UNICEF Joint Programme.

### 15.1 Establishment UNFPA-UNICEF Joint Programme

#### 15.1.1 Phase I: 2008-2013

The Joint Programme was launched in 2008 at the country level. The 17 countries<sup>481</sup> in the Programme are: Burkina Faso, Djibouti, Egypt, Eritrea, Ethiopia, The Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Mali, Mauritania, Senegal, Somalia, Sudan, Tanzania and Uganda. The Joint Programme aims to support and accelerate in these countries community and national efforts already being undertaken at country and regional levels "that have demonstrated their effectiveness in creating positive social change."<sup>482</sup> The Joint Programme is not a stand-alone initiative, but is working in partnership with national governments, civil society, religious leaders, communities and key stakeholders. The Joint Programme engages parliamentarians, media, traditional communicators, women lawyers, medical associations, religious leaders, scholars, women and youth to speak out against the practice.<sup>483</sup> The

<sup>481</sup> The Joint Programme was only implemented in 15 African countries from 2008 to 2013 due to budget shortfalls (the Joint Programme received approximately \$40,7 million instead of the estimated \$44 million) Therefore, the Joint Programme decided to reduce the overall number of countries. In 2008, the Joint Programme was implemented in Djibouti, Egypt Ethiopia, Guinea Guinea-Bissau Kenya, Senegal and Sudan. In 2009, the Joint Programme was implemented in Burkina Faso, The Gambia, Somalia and Uganda. In 2011, the Joint Programme was implemented in Eritrea, Mali and Mauritania.

<sup>482</sup> United Nations Population Fund and United Nations Children's Fund, *UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change, Annual Report 2010*, p. 5, available at [http://www.unfpa.org/sites/default/files/pub-pdf/2010\\_Annual\\_Report\\_2.pdf](http://www.unfpa.org/sites/default/files/pub-pdf/2010_Annual_Report_2.pdf) [Last Accessed 1 October 2015].

<sup>483</sup> United Nations Population Fund, *International Conference on Research, Health Care and Preventive Measures for Female Genital Mutilation/Cutting and The Strengthening of Leadership and Research in*

Joint Programme has a holistic, cross-border approach that aims to “acts as a catalyst” for action at the national level.<sup>484</sup> The Joint Programme brings the complementary expertise of the two UN agencies (in partnership with grass-roots community organizations) together with the latest theoretical developments in social science research.<sup>485</sup>

The overall design of the Joint Programme is inspired by the “significant experiences”<sup>486</sup> of the CSO Tostan in Senegal and the “groundbreaking social norms research”<sup>487</sup> developed by Thomas Shelling and Gerry Mackie. The Tostan strategy for abandonment of FGM/C through community-based development is used as a model in several other participating countries: “The main strategic approach is to gain the support of an initial core group, which decides to abandon FGM/C and mobilises a sufficient number of people to facilitate a tipping point and thereby create a rapid social shift of the cutting social convention norm.”<sup>488</sup> According to both UNICEF and UNFPA, the theory of self-enforcing social conventions has “provided insight into why such practices persist and has aided the development of community-based strategies for FGM/C abandonment.”<sup>489</sup> Based on understanding FGM/C as a social norm, the Joint Programme focuses on accelerating collective, rather than individual, social change to achieve sustainable FGM/C abandonment.<sup>490</sup> However, beyond approaching FGM/C as a social norm, the Programme also emphasizes commitment to a human rights-based approach to programming and cultural

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*Africa, Conference Report*, Nairobi, Kenya, 17-19 October 2011, p. 3, available at:

[http://www.unfpa.org/sites/default/files/resource-pdf/UNFPA%20Nairobi%20Conference%20Report\\_v11\\_1.pdf](http://www.unfpa.org/sites/default/files/resource-pdf/UNFPA%20Nairobi%20Conference%20Report_v11_1.pdf) [Last Accessed 1 October 2015].

<sup>484</sup> United Nations Population Fund and United Nations Children’s Fund, *UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change, Annual Report 2010*, p. 1, available at [http://www.unfpa.org/sites/default/files/pub-pdf/2010\\_Annual\\_Report\\_2.pdf](http://www.unfpa.org/sites/default/files/pub-pdf/2010_Annual_Report_2.pdf) [Last Accessed 1 October 2015].

<sup>485</sup> See the website of United Nations Population Fund, *Joint Programme on Female Genital Mutilation/Cutting*, available at <http://www.unfpa.org/joint-programme-female-genital-mutilationcutting>. [Last Accessed 1 October 2015].

<sup>486</sup> United Nations Population Fund and United Nations Children’s Fund, *Joint Evaluation of the UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change (2008-2012) – Senegal* (Original in French: *Évaluation Conjointe du Programme Conjoint UNFPA-UNICEF sur les Mutilations Génitales Féminines/Excision: Accélérer le Changement (2008-2012) – Sénégal*), New York, July 2013, p. 3.

<sup>487</sup> United Nations Population Fund and United Nations Children’s Fund, *UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change, Annual Report 2012*, p. 18, available at [http://www.unfpa.org/sites/default/files/pub-pdf/UNICEF-UNFPA%20Joint%20Programme%20AR\\_final\\_v14.pdf](http://www.unfpa.org/sites/default/files/pub-pdf/UNICEF-UNFPA%20Joint%20Programme%20AR_final_v14.pdf) [Last Accessed 1 October 2015].

<sup>488</sup> United Nations Population Fund and United Nations Children’s Fund, *Female Genital Mutilation/Cutting: Accelerating Change, Funding Proposal UNFPA-UNICEF Joint Programme*, p. 5, available at [http://www.unfpa.org/sites/default/files/pub-pdf/fgm\\_proposal\\_donors.pdf](http://www.unfpa.org/sites/default/files/pub-pdf/fgm_proposal_donors.pdf) [Last Accessed 1 October 2015].

<sup>489</sup> United Nations Population Fund and United Nations Children’s Fund, *UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change, Annual Report 2012*, p. 18, available at [http://www.unfpa.org/sites/default/files/pub-pdf/UNICEF-UNFPA%20Joint%20Programme%20AR\\_final\\_v14.pdf](http://www.unfpa.org/sites/default/files/pub-pdf/UNICEF-UNFPA%20Joint%20Programme%20AR_final_v14.pdf) [Last Accessed 1 October 2015].

<sup>490</sup> United Nations Population Fund and United Nations Children’s Fund, *Abandonment of Female Genital Mutilation/Cutting: Accelerating Change, Summary Report of Phase I 2008-2013*, p. 2, available at <http://www.unfpa.org/sites/default/files/pub-pdf/Joint%20Programme%20on%20FGMC%20Summary%20Report.pdf> [Last Accessed 1 October 2015].

sensitivity: “approaching FGM/C as a violation of the rights of girls and women (while recognizing that as FGM/C has a strong cultural value in many contexts), dialogue with communities must be framed in terms of preserving positive cultural values while eliminating harmful practices.”<sup>491</sup>

In 2012-2013, in its fifth year of implementation, an evaluation of the Joint Programme was undertaken. The purpose of the study was to evaluate the extent to which and under what circumstances the UNFPA-UNICEF Joint Program has accelerated the abandonment of FGM/C in programme countries during the period 2008-2012. The evaluation revealed that the Joint Programme “has been contributing to moving change processes at global, national, and community levels into the desired direction.”<sup>492</sup> More specifically, the following results have been achieved between 2008 and 2013: “(i) National policy or legislation adopted in 12 of the 15 programme countries, (ii) Protocols for FGM survivors integrated into ante- and post-natal care at 5,500 health facilities, (iii) Training of over 100,000 health practitioners on FGM prevention, response and care (iv) Public declarations of abandonment in over 12,700 communities, (v) Public declarations from 20,000 religious and traditional leaders disavowing any religious requirements for FGM.”<sup>493</sup> However, one of the findings was that the time-bound overall objective of was “overly ambitious.”<sup>494</sup> Therefore, one of the recommendations of the evaluation was to take the Joint Programme approach further and to “pursue a second phase of the joint programme to sustain the existing positive momentum for change towards FGM/C abandonment.”<sup>495</sup>

#### 15.1.2 Phase II: 2014-2017

In 2014, the UNFPA-UNICEF Joint Programme launched a second phase (January 2014 till December 2017), expanding its work from 15 to 17 countries (including Burkina Faso, Djibouti, Uganda, Egypt, Ethiopia, Eritrea, Gambia, Guinea, Guinea Bissau, Kenya, Mali, Mauritania, Nigeria, Senegal, Sudan, Somalia and Yemen). The aim of Phase II is to “contribute to the acceleration of the total abandonment of FGM/C in the next generation (i.e. next 20 years) in line with United Nations General Assembly Resolution A/RES/67/146 to “Intensify global efforts to eliminate female genital mutilations”.”<sup>496</sup> More

<sup>491</sup> United Nations Population Fund and United Nations Children’s Fund, *Joint Evaluation Report UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change, 2008-2012*, Volume I, New York, September 2013, p. 19, available at [http://www.unicef.org/evaluation/files/FGM-report\\_11\\_14\\_2013\\_Vol-I.pdf](http://www.unicef.org/evaluation/files/FGM-report_11_14_2013_Vol-I.pdf) [Last Accessed 1 October 2015].

<sup>492</sup> *Ibid*, p. 44.

<sup>493</sup> See the website of United Nations Population Fund, *Joint Programme on Female Genital Mutilation/Cutting*, available at <http://www.unfpa.org/joint-programme-female-genital-mutilationcutting>. [Last Accessed 1 October 2015].

<sup>494</sup> United Nations Population Fund and United Nations Children’s Fund, *Joint Evaluation Report UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change, 2008-2012*, Volume I, New York, September 2013, p. 63, available at [http://www.unicef.org/evaluation/files/FGM-report\\_11\\_14\\_2013\\_Vol-I.pdf](http://www.unicef.org/evaluation/files/FGM-report_11_14_2013_Vol-I.pdf) [Last Accessed 1 October 2015].

<sup>495</sup> *Ibid*, p. 69.

<sup>496</sup> United Nations Population Fund and United Nations Children’s Fund, *Abandonment of Female Genital Mutilation/Cutting: Accelerating Change, Funding Proposal UNFPA-UNICEF Joint Programme*

specifically, the goal is to achieve a 40% decrease in prevalence among girls aged 14 and younger in at least 5 of the 17 countries and at least one country declaring total abandonment of FGM/C by the end of 2017. The estimated budget is \$54 million. The Joint Programme continues to use the holistic, culturally sensitive and human rights-based approach in the second phase, although UNICEF and UNFPA will also focus on the responsiveness of health and child protection systems to care for women and girls affected by FGM/C.<sup>497</sup>

## 15.2 UNICEF-UNFPA Joint Programme in Senegal

Senegal participated in the joint program since its launch on 9 September 2008. Senegal has been referred to by the Joint Programme as a “pioneer in the abandonment process”<sup>498</sup> and was selected as one of the first countries<sup>499</sup> for immediate acceleration. According to the Funding Proposal of the Joint Programme, “the abandonment process occurring in Senegal has reached a critical point in its development. Senegal’s progress indicates the likelihood of wide-spread abandonment to all regions where FGM/C is practiced, provided that adequate resources are devoted to allow for a scaling-up towards acceleration of the abandonment process.”<sup>500</sup> According to the Joint Programme Annual Report of 2011, of the 15 countries active in the Joint Programme, “Senegal has made the most rapid progress toward the abandonment of FGM/C.”<sup>501</sup>

### 15.2.1 Evaluation UNICEF-UNFPA Joint Programme in Senegal

Senegal was selected as one of the four country case studies<sup>502</sup> when the Joint Programme was evaluated in 2012-2013. The purpose of the country case studies was “to allow exploration and illustration of key issues, while taking into account specific national and local contexts in which the Programme was

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Phase II, January 2014, p. 2, available at <http://www.unfpa.org/sites/default/files/resource-pdf/Funding%20Proposal%20for%20Phase%20II%20of%20the%20UNFPA-UNICEF%20Joint%20Programme.PDF> [Last Accessed 1 October 2015].

<sup>497</sup> See the website of United Nations Population Fund, *Joint Programme on Female Genital Mutilation/Cutting*, available at <http://www.unfpa.org/joint-programme-female-genital-mutilationcutting>. [Last Accessed 1 October 2015].

<sup>498</sup> United Nations Population Fund and United Nations Children’s Fund, *Joint Evaluation of the UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change (2008-2012) – Senegal* (Original in French: *Évaluation Conjointe du Programme Conjoint UNFPA-UNICEF sur les Mutilations Génitales Féminines/Excision: Accélérer le Changement (2008-2012) – Sénégal*), New York, July 2013, p. 16.

<sup>499</sup> The Gambia, Guinea, Guinea-Bissau, Mali and Mauritania.

<sup>500</sup> United Nations Population Fund and United Nations Children’s Fund, *Female Genital Mutilation/Cutting: Accelerating Change, Funding Proposal UNFPA-UNICEF Joint Programme*, p. 13, available at [http://www.unfpa.org/sites/default/files/pub-pdf/fgm\\_proposal\\_donors.pdf](http://www.unfpa.org/sites/default/files/pub-pdf/fgm_proposal_donors.pdf) [Last Accessed 1 October 2015].

<sup>501</sup> United Nations Population Fund and United Nations Children’s Fund, *UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change, Annual Report 2011*, p. 8, available at [http://www.unfpa.org/sites/default/files/pub-pdf/Annual\\_report\\_on\\_FGM-C\\_2011\\_low\\_res.pdf](http://www.unfpa.org/sites/default/files/pub-pdf/Annual_report_on_FGM-C_2011_low_res.pdf) [Last Accessed 1 October 2015].

<sup>502</sup> The other three country case studies are Kenya, Burkina Faso and Sudan.



implemented.”<sup>503</sup> The evaluation focused on the national and community level and their interconnections, but also looked at linkages with the regional and global levels.<sup>504</sup>

According to the evaluation, the Joint Programme is highly relevant to the commitments in Senegal and it “corresponds to a strong political will and a corresponding legal framework at the government level.”<sup>505</sup> The results of the evaluation in Senegal are positive. The Joint Programme has provided “clear and significant contributions to the strengthening of an environment at the national level, suitable for the abandonment of FGM/C in Senegal.” In particular, it has contributed to: (i) strengthening the institutional and national policy framework through the development of the second NAP (2010-2015) and the establishment of the National Technical Committee responsible for its monitoring and coordination; ii) strengthening the coordination of stakeholders at national level by encouraging the involvement of various government entities towards the abandonment of FGM/C; iii) the extension of the law 99-05 of 29 January 1999 prohibiting the practice of FGM/C among all actors involved in the work against FGM/C; iv) greater involvement of the Ministry of Health of Senegal in the movement to end FGM/C.”<sup>506</sup> The study concluded that “undeniable progress has been made towards the abandonment of FGM/C in Senegal,” although the sustainability of the Joint Programmes achievements remains uncertain.<sup>507</sup>

### 15.3 Respondents’ views on the UNFPA-UNICEF Joint Programme

According to the respondents (including representatives of the government, civil society and international organizations), the UNFPA-UNICEF Joint Programme has two main roles. In the first place, their role is to financially and technically support and assist the Senegalese Government. More specifically, the respondents explained that the Joint Programme’s role is to reinforce the capacity of the Direction of the Family. In the second place, respondents explained that the role of the Joint Programme is to financially support civil society organizations in order to contribute to the accelerated abandonment of FGM/C in Senegal.

<sup>503</sup> United Nations Population Fund and United Nations Children’s Fund, *Joint Evaluation of the UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change (2008-2012) – Senegal* (Original in French: *Évaluation Conjointe du Programme Conjoint UNFPA-UNICEF sur les Mutilations Génitales Féminines/Excision: Accélérer le Changement (2008-2012) – Sénégal*), New York, July 2013, p. 1-2.

<sup>504</sup> United Nations Population Fund and United Nations Children’s Fund, *Joint Evaluation of the UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change (2008-2012) – Senegal* (Original in French: *Évaluation Conjointe du Programme Conjoint UNFPA-UNICEF sur les Mutilations Génitales Féminines/Excision: Accélérer le Changement (2008-2012) – Sénégal*), New York, July 2013, p. 1-2.

<sup>505</sup> *Ibid.*, p. ix.

<sup>506</sup> *Ibid.*

<sup>507</sup> *Ibid.*, p. xii.

### 15.3.1 *Positive remarks about the UNICEF-UNFPA Joint Programme*

In general, many respondents (including representatives of the government, international organizations and civil society) were positive about the Joint Programme. A representative of an international organization said: "I think it is a great programme for different reasons. The Joint Program has been a key program, also in terms of mobilizing resources. However, the resources that the Joint Program mobilised are very little compared to with regard to what is needed." A representative of civil society said: "The United Nations Institutions injected much money in this theme, in FGM." A representative of civil society said: "Without UNICEF and UNFPA, the National Action Plan would not be as good as it is." Another civil society representative explained: "They really pushed for the National Action Plan." Another representative of civil society said: "The Joint Programme had a big influence on the policy making with regard to FGM in Senegal." A government representative said: "The Joint Programme is one of the main funders for our National Action Plan, that is really good for us." A representative of an international organization said: "When the programme started in 2008 it was able to accelerate the movement." A representative of civil society explained: "People in the village were educated about FGM and now understand more, discovered more, because of the Joint Programme. Within the community, the sensibilisation is well done. The community understand more about the human rights approach."

### 15.3.2 *Critical remarks: exclusive focus on Tostan*

However, although many representatives were positive about the Joint Programme, a major concern of many respondents (including representatives of the government and international organizations, but mostly of civil society representatives) was that the main implementing partner of the Joint Programme was Tostan. Although the 'Tostan experience' inspired the overall design of the Joint Programme, respondents argued that they were not in favor of the decision of the Joint Programme to provide Tostan with the majority of the Joint Programme resources. A civil society representative said: "UNICEF and UNFPA work with the same people over and over again." Another representative of civil society explained: "My problem with the Joint Programme is that they support only one NGO, which has already a lot of money, instead of working with all the NGOs. This is my personal view. I think that they should work with everybody." A representative of an international organization explained: "All the money is earmarked for Tostan. Even though the people in Dakar working for UNICEF and UNFPA they want to give the money to other organizations, but they were not allowed to because in New York they decided that it's for Tostan." A representative of civil society said: "Because all the Joint Programme money was for Tostan, some NGOs stopped working in the field of FGM, which is a problem. Because you cannot talk about a Joint programme with just one NGO. Senegal is not only Tostan. It is true that Tostan did something good, they did good things, but one NGO cannot realize everything. So you should also respect the approach of other NGOs. So in my view the Joint Programme should help Tostan, but they should also help the other NGOs who are working in the field of FGM. This is one of the problems of the Joint programme. They focus on Tostan and forget the others." Another representative of civil society said: "The downside of working with only one

NGO is that you will lose other organizations, other people, with other competences and knowledge. It is not good to focus on one organization. The Joint Programme should support smaller NGOs as well.” Another representative of civil society explained: “Tostan is a very big NGO and had a lot of influence in the field. They did many good things with regard to FGM in the field: many public declarations and so on. That was mainly possible because of the money from UNICEF and later because of the money of the Joint Programme. But there are also smaller NGOs, who decided a few years ago not to really focus on FGM any more, because all the money was going to TOSTAN. I think that they also have a lot of knowledge and they also have a good approach to fight FGM, to change the cultural practice.”

When the Joint Programme was evaluated in Senegal in 2012-2013, the same issue was raised. The report reveals: “the Joint Programme has tended to make the Tostan model exclusive in Senegal, at the expense of other approaches and actors.”<sup>508</sup> In addition, the report concluded that the focus on the Tostan approach “leaves little space for innovation and diversification.”<sup>509</sup> There was no real opportunity to “test the validity of other approaches” in order to “demonstrate whether these approaches would have had even more significant results and/or lower costs.”<sup>510</sup> Therefore, one of the recommendations following from the evaluation was that it would be beneficial to limit Tostan’s dominance by considering the integration of new strategies involving new actors.<sup>511</sup> The Joint Programme was recommended to “analyze the relevance of diversifying approaches and partners to accelerate the abandonment of FGM/C in Senegal.”<sup>512</sup>

### 15.3.3 Critical remarks: cooperation between UNFPA and UNICEF

Some respondents (including representatives of the government, civil society and international organizations) were concerned about the cooperation between the two agencies. Although the added value of the Joint Programme lies in the distinct and complementary approaches and areas of expertise of each of the agencies involved in this partnership, respondents explained that there is a lack of coordination and collaboration between the two agencies. This weakness in coordination between the two agencies has led to inefficiencies in the implementation of the Programme and “hampers the way forward,” according to the respondents.

A representative of an international organization said: “Collaboration is always difficult, especially between UN agencies.” Another representative of an international organization said: “Collaboration is not easy because every agency has its own priority.” A representative of civil society explained: “The Joint

<sup>508</sup> United Nations Population Fund and United Nations Children’s Fund, *Joint Evaluation of the UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change (2008-2012) – Senegal* (Original in French: *Évaluation Conjointe du Programme Conjoint UNFPA-UNICEF sur les Mutilations Génitales Féminines/Excision: Accélérer le Changement (2008-2012) – Sénégal*), New York, July 2013, p. xi-xii.

<sup>509</sup> *Ibid.*, p. xi.

<sup>510</sup> *Ibid.*, p. 59-60.

<sup>511</sup> *Ibid.*, p. 63.

<sup>512</sup> *Ibid.*, p. 62.

Programme is good, because they are fighting against FGM. But, the managing of the programme is a problem. UNICEF was the first who was fighting for FGM in Senegal. When the UNFPA joined, they focus on health. But the approach is having good health, vaccinate your child, HIV, etc. But UNICEF approach is sensitization and advocacy. It is not the same approach. And for me that is a problem. There are two partners, and one project. There is not one big leader and that is a problem of management. The coordination is a problem. There is no direction.” Another representative of civil society said: “I think that the Joint Programme is really trying to do something in the countries. But sitting in New York as a regional project and working in Africa without having an office in Africa, I find that very difficult. It is difficult for them to implement their strategy. With this kind of a big project, you should have staff. I would say they would be more effective if they would have an UNFPA-UNICEF Joint Program office or Focal Point on FGM in Dakar.”

A representative of an international organization said that both UNICEF and UNFPA are “running after the same funding” which makes them competitors, instead of joint partners: “They drive different horses at the moment, but they should be one horse.”

When the Joint Programme was evaluated in Senegal in 2012-2013, the same issue was raised. The added value of the Joint Programme is “mitigated by the limits of coordination between the two agencies and real risk of divergence in terms of implementation.”<sup>513</sup> One of the challenges that the Joint Programme should overcome is that both UNICEF and UNFPA “work on their own, without engaging in a real common strategic thinking.”<sup>514</sup> Therefore, one of the recommendations of the evaluation was to strengthen the system of consultation between the two agencies that could “provide more coordinated implementation of field activities and thus ensure better cohesion of the message.”<sup>515</sup>

## 16 DATA COLLECTION AND RESEARCH

During the interviews, I explored the views of my respondents regarding, amongst others, whether basic data is collected and disseminated about the prevalence, trends, attitudes and behaviour regarding FGM/C in Senegal, as well as reported cases and enforcement of legislation.

<sup>513</sup> United Nations Population Fund and United Nations Children’s Fund, *Joint Evaluation of the UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change (2008-2012) – Senegal* (Original in French: *Évaluation Conjointe du Programme Conjoint UNFPA-UNICEF sur les Mutilations Génitales Féminines/Excision: Accélérer le Changement (2008-2012) – Sénégal*), New York, July 2013, p. xi.

<sup>514</sup> Ibid.

<sup>515</sup> United Nations Population Fund and United Nations Children’s Fund, *Joint Evaluation of the UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change (2008-2012) – Senegal* (Original in French: *Évaluation Conjointe du Programme Conjoint UNFPA-UNICEF sur les Mutilations Génitales Féminines/Excision: Accélérer le Changement (2008-2012) – Sénégal*), New York, July 2013, p. xii.

## 16.1 DHS and MICS surveys

Many respondents (including representatives of the government, civil society and international organizations) referred in the first place to the Demographic and Health Surveys (DHS) developed by ICF International and in the second place to the Multiple Indicator Cluster Surveys (MICS), which are conducted with financial and technical assistance from UNICEF. Both surveys are household surveys that provide data and key statistics in the areas of population, health and nutrition,<sup>516</sup> including data and statistics in some countries on FGM/C. In 2005, a module with questions on FGM/C was added to the women's questionnaire in Senegal for the first time. In 2010-2011, in 2012-2013 and in 2014 a module on FGM/C was added to the surveys again. This module provided information about the prevalence of FGM/C, the types of FGM/C practiced, the girl's age at the time of the procedure, the type of practitioner who performed the practice and the beliefs and opinions about FGM/C.

### 16.1.2 Reliability of self-reporting

Some respondents (mainly representatives of civil society) expressed their concern about the reliability of the results of the DHS and MICS surveys in relation to FGM/C. Self-reporting is the basis for determining FGM/C status and the assumption is that women respond truthfully when asked about FGM/C. However, there is, according to the respondents, a possibility that the validity of the survey responses are biased, especially because in Senegal legislation is in place criminalizing the practice.<sup>517</sup> A representative of civil society said: "What I think is problematic, is that all those studies are based on the declaration of people themselves." Another representative of civil society said: "There is nothing to prove that women and girls are not circumcised." A representative of civil society said: "Regarding the prevalence of FGM, it's very very very hard to have 100% or even 50% sure statistics. Because do you know how they measure? They measure it according to what victims are saying. Self-reporting. There is no real system of monitoring Female Genital Cutting in Senegal." Another representative of civil society said: "There is no evidence for the DHS data." Since genital inspections are not conducted as part of the surveys, the statements of women interviewed in the DHS-MICS survey are the only source of information. Although this methodological approach is standardized globally, some respondents had their doubts in relation to some of the results of the DHS-MICS in Senegal.

There are a few studies<sup>518</sup> that assessed the accuracy between self-reported

<sup>516</sup> See the website of the DHS Programme, available at <http://dhsprogram.com/What-We-Do/Survey-Types/DHS.cfm> [Last Accessed 1 October 2015].

<sup>517</sup> See also O. Bjälkander et al., Female Genital Mutilation in Sierra Leone: Forms, Reliability of Reported Status, and Accuracy of Related Demographic and Health Survey Questions, *Obstetrics and Gynecology International*, Volume 2013, Article ID 680926.

<sup>518</sup> R.C. Snow et al., Female Genital Cutting in Southern Urban and Peri-Urban Nigeria: Self-Reported Validity, Social Determinants and Secular Decline, *Tropical Medicine and International Health*, Volume 7, No. 1, 2002, p. 91–100; L. Morison et al., The Long-Term Reproductive Health Consequences of Female Genital Cutting in Rural Gambia: A Community-Based Survey, *Tropical*

and clinically observed FGM/C.<sup>519</sup> Some respondents (including representatives of civil society and international organizations) suggested medical assessments needs to be conducted in Senegal in order to make a reliable estimation of the FGM/C prevalence in the country. A representative of civil society suggested to check the genitals of young girls when they come to a medical centre for the vaccination programmes: “When girls are 0 to 5 years, they come for the vaccination programme. They can regularly check those girls while they are doing the vaccination, to see if they have been mutilated or not.” Another representative of civil society recommended to add FGM/C in the child health protocols: “When a child grows, we can measure his or her heights, the circle of his or her head, if he or she has been cut. This would be the only way for me to do research scientifically. But that will also mean that every Senegalese kid is followed by a physician or at least by a nurse. Then you can give a well-founded statistics, which is not the case now.”

## 16.2 Other Sources

Some respondents also referred to several evaluations and studies that took place in Senegal in relation to FGM/C. In 2008, the National Plan of Action for the Abandonment of Female Genital Mutilation (2000-2005) was evaluated<sup>520</sup> in order to identify strengths and weaknesses of the implementation of the NAP (see also section 12.1.2). In 2010, a study was conducted by Professor Ndiaye to get a more accurate picture of the status of implementation of Law No. 99-05 of 29 January 1999 criminalizing FGM/C in Senegal. The objective of this study was to assess the real impact of the law, and its relevance to current strategies for its elimination in Senegal.<sup>521</sup> In 2012-2013, the UNFPA-UNICEF Joint Programme was evaluated.<sup>522</sup> The purpose of the study was to evaluate the

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*Medicine and International Health*, Volume 6, No. 8, 2001, p. 643–653; H. Jones et al., Female Genital Cutting Practices in Burkina Faso and Mali and their Negative Health Outcomes, *Studies in Family Planning*, Volume 30, No. 3, 1999; S. Elmusharaf, et al, Reliability of Self Reported Form of Female Genital Mutilation and WHO Classification: Cross Sectional Study, *British Medical Journal*, Volume 333, No. 7559, 2006, p. 124–127; J.I. Adinma, Current Status of Female Circumcision among Nigerian Igbo, *West African Journal of Medicine*, Volume 16, No. 4, 1997, p. 227–231; S.E. Msuya et al, Female Genital Cutting in Kilimanjaro, Tanzania: Changing Attitudes? *Tropical Medicine and International Health*, Volume 7, No. 2, 2002, p. 159–165; E.F. Jackson et al., Inconsistent Reporting of Female Genital Cutting Status in Northern Ghana: Explanatory Factors and Analytical Consequences, *Studies in Family Planning*, Volume 34, No. 3, 2003, p. 200–210.

<sup>519</sup> O. Bjälkander et al., Female Genital Mutilation in Sierra Leone: Forms, Reliability of Reported Status, and Accuracy of Related Demographic and Health Survey Questions, *Obstetrics and Gynecology International*, Volume 2013, Article ID 680926.

<sup>520</sup> A. Diop-Diagne, *Evaluation of the National Plan of Action for the Abandonment of Female Genital Mutilation* (Original in French: *Évaluation du Plan d'Action National pour l'Abandon de la Pratique des Mutilations Génitales Féminines*), Ministry of the Family, National Solidarity and Female Entrepreneurship, September 2008.

<sup>521</sup> B. Ndiaye, *State Application of the Law on Excision in Senegal* (Original in French: *L'Etat d'Application de la Loi sur l'Excision au Sénégal*), Ministry of Family and Women's Organizations, UNFPA and UNICEF, December 2010, p. 18, para. 1.3.1.

<sup>522</sup> United Nations Population Fund and United Nations Children's Fund, *Joint Evaluation of the UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change (2008-2012) – Senegal* (Original in French: *Évaluation Conjointe du Programme Conjoint UNFPA-UNICEF sur les*

extent to which and under what circumstances the UNFPA-UNICEF Joint Program has accelerated the abandonment of FGM/C in programme countries during the period 2008-2012.

### 16.3 Need for more data collection

The majority of respondents (including representatives of the government, civil society and international organizations) argued that there is a strong need for further research and data collection on FGM/C in Senegal. A representative of civil society said: "Previous studies only looked at if people abandoned FGM or not. Now we need research to see why they are not changing. You know. Why they think that they should go ahead with the practice." Similarly, another representative of civil society said: "We need to do more research, because we need to know more about why people continue to do FGM to their family, to their kids." A representative of an international organization said that FGM/C is very complicated: "We need qualitative research to understand the dynamics of the practice." Some respondents explained that this kind of research is necessary, because data on attitudes towards FGM/C look promising, since 79% of the women believe that FGM/C should be abandoned in Senegal (see also para. 5.4.9). However, the practice still continues. A representative of an international organization said: "The data on attitudes show that women are now against the practice. But they are still cut. Why is that? The answer to that question could probably be the key of change. I think the pressure is so strong that they are kind of forced. But this needs to be researched to find out how attitudes can change a practice and how long that process is." A government representative said; "I think we need more research on FGM, why this practice persist." Many respondents explained that they were quite disappointed with the 2.5% decline in prevalence between 2005 and 2010, because they expected a bigger drop. A representative of an international organization said: "In Senegal there has been a lot of effort to stop FGM, so people were expecting a higher decrease." A representative of civil society said: "When I saw in the DHS-MICS the small result, I was surprised, because when we are in the village, people say that they stopped it."

The authors of the DHS-MICS 2010-2011 also explicitly highlighted the difficulty of collecting reliable data on FGM/C. They stated that the collection of data on FGM/C in Senegal "remains very necessary" to assess the progress reached towards to total abandonment of the practice and to define strategies. In addition, knowing girls and women's FGM/C status is "important for research studies that examine prevalence trends, determinants of the practice, and for evaluating the effects of interventions to address the practice."<sup>523</sup> The

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*Mutilations Génitales Féminines/Excision: Accélérer le Changement (2008-2012) – Sénégal*, New York, July 2013.

<sup>523</sup> O. Bjälkander et al., Female Genital Mutilation in Sierra Leone: Forms, Reliability of Reported Status, and Accuracy of Related Demographic and Health Survey Questions, *Obstetrics and Gynecology International*, Volume 2013, Article ID 680926; E. F. Jackson et al., Inconsistent Reporting of Female Genital Cutting Status in Northern Ghana: Explanatory Factors and Analytical Consequences, *Studies in Family Planning*, vol. 34, no. 3, 2003, p. 200–210.

authors of the DHS-MICS encouraged therefore the Senegalese government to establish an independent and thorough study on FGM/C.

## 17 SUPPORT SERVICES

During the interviews, I explored the views of my respondents if, amongst others, medical, social and psychological support services are available to assist and protect girls who have been subjected to FGM/C or those at risk of undergoing FGM/C. Many respondents (including representatives of the government and international organizations, but mostly representatives of civil society) indicated that adequate support services for girls and women who are (potential) victims of FGM/C do not exist in Senegal. According to many respondents, most efforts in Senegal focus on prevention of FGM/C, but little attention is given to providing support services for these women and girls. A representative of civil society said: "It is impossible to find this kind of support services in Senegal." Another representative of civil society said: "Really, we don't have support services specifically for persons who are victims of FGM." Another representative of civil society said: "There is no specific structure or service for FGM." A representative of the government said: "There is no real support for girls who are excised." It seems that the health care system in Senegal is not organized to meet health concerns of girls and women in relation to FGM/C. There are no FGM/C helplines, shelters or safe houses.<sup>524</sup> There are no centres or organizations that specifically provide support services to girls and women who are (potential) victims of FGM/C. Only general services are available in Senegal. A representative of civil society explained: "Right now, we don't have a center just for FGM. We don't have services for FGM. But what we have, in general, is services and centers for young people." A representative of an international organization said: "Also the National Action Plans focus on aspects of prevention and not so much on support services. Right now, there is a gap and that is really a problem.[...] Women are in need and they are not supported well."

A complicating factor with regard to the support services might be that girls and women who underwent FGM/C often do not see themselves as victims. A representative of civil society explained: "The persons who underwent FGM, some people can look them as victims. But are we sure that themselves, they are looking at themselves as a victim? Just a few women really think that they victims." More representatives of civil society explained that the majority of girls and women think that FGM/C is something normal and it is part of their life. Some representatives of civil society explained that even if women come to the hospital, they are there to discuss about "some disease they have," but not about FGM/C that is often the cause of the problems they have.

During the interviews, I also explored the views of my respondents why this lack of medical, social and psychological support services for girls who have

<sup>524</sup> At the time of this research, there was one shelter under construction under the supervision of the CSO 'La Palabre'. This shelter will in the future provide support to young girls and women who fled from FGM/C, forced/child marriage of the consequences of unwanted pregnancies, as well for youngsters in difficult situations.



been subjected to FGM/C or those at risk of undergoing FGM/C exists in Senegal. The main answer to this question was that this is not a priority of the government at this moment. A representative of civil society said: "These problems are by far not priority for the government. And it's clear. It's not their priority. [...] They don't have enough resources to take care of everything." Another representative of civil society said: "What I know is that the Government does not see this as a priority, because they have so many other incredible problems on their plate that are causing death, for example child mortality and maternal mortality. But again, infant mortality and maternal mortality are related to FGC. But when they have to make a choice, the way they allocate their resources, they allocate it to malaria, diarrhea and those kind of things that are causing death." Another representative of civil society explained: "There are other things the Senegalese government need to worry about."

### 17.1 Social and psychological support services

There is one organization in Senegal that provides support services to victims of VAW and children in general. In some cases, they also provide social and psychological support services to women and girls in case of FGM/C. This organization is called the Committee for the Prevention of Violence Against Women and Children (*Comité de Lutte Contre les Violences faites aux Femmes et aux Enfants*). Created in 1996, the Committee's main objective is to contribute to the eradication of all forms of violence against women and children.<sup>525</sup> This organization supports women and children who are victims of violence through their own counselling centres that are spread all over the country. However, some representatives of civil society explained that women and girls who underwent FGM/C are very hesitant to ask for social and psychological help. A representative of civil society explained: "Sometimes they call me that they want to see me, but I never see them." These victims want help and that is why they call the centers, but they are in the end too afraid to indeed take action and go to the centers to receive counselling.

In addition, respondents explained that there is one sexologist working at the Grand Yoff hospital in Dakar who is an expert on the psychosexual consequences of FGM/C. During her consultations and counselling sessions she is helping women (and their husbands) to overcome sexual problems resulting from the FGM/C. She also uses sexual therapy to help women deal with the psychological trauma associated with FGM/C.

### 17.2 Reconstructive surgeries

Since 2012, reconstructive surgeries are offered in Senegal to women who underwent FGM/C. Reconstructive surgery to repair the physical damage for victims of FGM/C has been around for a long time, but the technique of clitoral

<sup>525</sup> See the website of the Committee for the Prevention of Violence Against Women and Children, *Objectives of CLVF*, available at <http://clvf.courantsdefemmes.org/objectifs.html> [Last Accessed 1 October 2015].

repair surgery to restore clitoral function is relatively new. In 2004, Dr. Pierre Foldès, a French urologist and surgeon discovered that it was possible to reconstruct the nerve network that allows the clitoris to regain sexual functions. The reconstructive surgery, also known as 'clitoroplasty', involves removing the scar tissue, pulling the remaining clitoris up to the surface, and then stitching it into the natural place. It reduces pain and increase sexual pleasure in women who had undergone FGM/C. With financial support of UN Women, seven Senegalese surgeons received certification after training from Dr. Foldès on the technique. The first 50 surgeries could be offered free of charge, because UN Women financed these operations as well as the necessary equipment in an effort to make the clitoral repair surgery readily available in Senegal. The Senegalese surgeons have been overwhelmed by demand for these reconstructive surgeries and performed these surgeries not only in Dakar, but all over the country. Unfortunately, the funding of UN Women stopped in 2013. Although the surgeons try to keep the operations as low-cost as possible, most women in Senegal cannot afford the surgery.

### 17.3 Legal support services

In 1974 a group of women lawyers formed the Senegalese Association of Jurists (*Association des Juristes Sénégalais* - AJS). They aim to promote, popularize and contribute to the development of law, but also conduct awareness and promote the empowerment of women and protection of human rights. In 2008, they opened a 'law shop' [*La Boutique du Droit*] in the Medina district in Dakar where women can come to seek advice and free legal assistance. The aim of the 'law shop' is to make law and justice financially and psychologically more accessible. Many of the women who came to AJS have been victims of rape and domestic violence. Due to poverty, most women don't have the financial means to hire a lawyer and AJS receives these women at their 'shop'. Most women do not understand the legal process or even how to file a police report, representatives of civil society explained. AJS accompanies these women throughout the entire process. In addition to the free consultations, the Department of Law has established a hotline for the most remote communities in Senegal in order for them to also benefit from legal advice. In theory, women can come to seek legal advice regarding FGM/C cases, but up to now no women came to the 'shop' to seek advice regarding FGM/C. AJS has also embarked upon educational programmes to sensitize women about their rights, including training programmes on the law that criminalizes FGM/C.

## 18 TRAINING FOR STUDENTS AND PROFESSIONALS

### 18.1 Curricula for students

During the interviews, I explored the views of my respondents whether, amongst others, awareness of FGM/C is integrated in the curricula of (medical, legal, social work) students. Many respondents (including representatives of the government, international organizations, and civil society) explained that awareness of FGM/C is not integrated in the curricula of students. A representative of civil society said: "They don't have a specific course on FGM

now. They have a general course on nutrition, a general course on reproductive health, they can discuss a little bit about FGM during these courses, just an introduction of FGM, but they don't have courses that really focus on FGM, no." A representative of an international organization said: "No, I don't think it is in their curriculum." Another representative of civil society said: "Students are not trained. They do not have FGM in their curriculum. We recently invited the nurse school in Dakar to talk about FGM, but it is not in their programme. There are no courses they can take. They are not trained on FGM, although 26% of the population underwent this practice. Only the NGOs are talking about FGM, not the universities." Another representative of civil society argued: "They don't teach about FGM in the university. They need to do courses on this, but at this moment I never hear about students who are doing a specific course of FGM. They have courses on human rights, on gender, but not on FGM."

However, an initiative taken by the CSO Group for Population Studies and Education (*Le Groupe pour l'Étude et l'Enseignement de la Population – GEEP*) deserves to be mentioned here. They developed in 2011 a curriculum on reproductive health and FGM/C, which was integrated into high school and college curriculums. According to the UNFPA-UNICEF Joint Programme, this course on FGM/C is "probably the first of its kind anywhere."<sup>526</sup> The aim of the curriculum on reproductive health and FGM/C is to provide information on FGM/C in order to make sure that students can make informed choices and, if necessary, make use of available health services.<sup>527</sup> The course targets students aged 10 to 19 years. The course covers the different forms of FGM/C, the health and psychological effects of the practice and the human rights that apply to girls' physical integrity.<sup>528</sup> It further includes: the elements of reproductive health and the link between development and reproductive health at the national, family and personal levels (i.e., perceptions and the role of cultural norms in reproductive health), the development of positive attitudes regarding relationships between the sexes and participation in community activities to improve reproductive health.<sup>529</sup>

## 18.2 Training of professionals

During the interviews, I also explored the views of my respondents whether, amongst others, health professionals (doctors, nurses, midwives, psychologists) were trained to detect, manage and counsel FGM/C and if trainings on FGM/C were provided for the following other sectors: family services and child protection services, teachers and other school staff, legal professionals (judges,

<sup>526</sup> United Nations Population Fund and United Nations Children's Fund, *UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change, Annual Report 2011*, p. 17, available at [http://www.unfpa.org/sites/default/files/pub-pdf/Annual\\_report\\_on\\_FGM-C\\_2011\\_low\\_res.pdf](http://www.unfpa.org/sites/default/files/pub-pdf/Annual_report_on_FGM-C_2011_low_res.pdf) [Last Accessed 1 October 2015].

<sup>527</sup> See the website of the Group for Population Studies and Education, available at [http://www.geep.org/geep/index.php?option=com\\_content&task=view&id=68&Itemid=162](http://www.geep.org/geep/index.php?option=com_content&task=view&id=68&Itemid=162) [Last Accessed 1 October 2015].

<sup>528</sup> Ibid.

<sup>529</sup> Ibid.

magistrates, lawyers), immigration officers and law enforcement professionals. Many respondents (including representatives of the government, international organizations, and civil society) explained that this is not the case. A representative of civil society argued: "There is no training for professionals on FGM. Myself, I never saw it. Not for social workers, not for medical professionals, not for psychologists, there is nothing done." Another representative of civil society explained: "Also the doctors who are in the local areas in our country, they are not trained on FGM." A representative of an international organization explained: "There is not a public health course about FGM. They just learn a few small things on FGM, but we want to change that. We are working with the government to change the curricula for health professionals, to change the courses of the health sector, to make them understand what FGM is, how it works, what the consequences are, which health problems, etc. At this moment this does not exist." A government representative explained: "We intend to include FGM in the training courses for all the medical staff all over Senegal. It is our plan, it will be done, but it is not done yet."

### 18.3 New initiative

Marianne Sibide N'Diaye, the president of Senegal's National Association of Midwives and a practicing midwife herself came to the same conclusion and explained: "Poor referral systems and geographic isolation keep women who have experienced circumcision from getting needed help. Even when they can travel to a hospital or clinic, women find that midwives, doctors, and nurses lack the training and coordination to serve their needs. The results of this systemic flaw are thousands of unnecessary injuries and hundreds of preventable deaths."<sup>530</sup> With support from the Senegalese CSO COSEPRAT, she has designed a new FGM/C training programme for health care providers in order to prepare midwives and nurses to deal effectively with women who experienced FGM/C. She inserted a new module into the standard curriculum, devoted to FGM/C education and taught by a team of physicians and psychologists. In addition to training, she has also laid the foundation for support and counseling centers serving girls and women affected by FGM/C, partnering with midwives in rural areas to identify and serve affected women.<sup>531</sup>

## 19 ALTERNATIVES

During the interviews, I explored the views of my respondents regarding, amongst others, whether training programmes for the women who perform FGM/C are provided, in order for them to adopt an alternative profession. This 'alternative source of income approach' entails that FGM/C must be seen as a (lucrative) business: the market of cutting depends on both supply and demand.

<sup>530</sup> See the website of Ashoka Sahel, available at <http://sahel.ashoka.org/fellow/marianne-sidibe-ndiaye> [Last Accessed 1 October 2015].

<sup>531</sup> Ibid.

Proponents of this approach argue that FGM/C should not be addressed through education and awareness raising alone, but also through the provision of alternative means of income to the cutters. According to this approach, cutters need to be specifically targeted, since they would only set aside their knives and razor blades if the economic incentives were eliminated. Programmes based on this approach provide cutters with resources, equipment and necessary training to run a small business in order to make it possible for the cutters to abandon FGM/C. For example, in Ghana, cutters were trained to become professional midwives. In Ethiopia, cutters were provided instruction in sandal making and bread-baking. This economic aspect in relation to FGM/C is referred to as the “missing piece to the puzzle of eradication efforts.”<sup>532</sup> Many respondents (including representatives of the government, civil society and international organizations) explained that training programmes for cutters are not (any more) provided in Senegal and the majority of respondents were not in favour of this ‘alternative source of income approach’.

### 19.1 Position of the traditional practitioner

First of all, to substantiate their claim, many respondents (including representatives of the government, civil society and international organizations) clarified that one should not underestimate the status and vested interests of cutters within communities where FGM/C is practiced. Usually, an older woman (often a midwife or an elder) performs the procedure (see also Chapter III). Respondents explained that these cutters play a crucial role, wield much power, enjoy great respect and have significant status within communities because of their work. Respondents referred to cutters during the interviews as “old”, “clever”, “well respected”, “knowledgeable”, “powerful” and as “someone who has traditional expertise” and “knowledge about rituals.”

### 19.2 Alternative source of income approach

A few representatives of civil society explained that they are in favour of the ‘alternative source of income approach’ and regretted that training programmes for cutters were not provided in Senegal. They argued that special attention need to be provided for the cutters, since they will not stop performing FGM/C if they do not have an alternative source of income. One representative of civil society explained: “I know a cutter who supports with the cutting her family. Because she has a job, she has the money to help her family. [...] She will never stop, because it is her income. If somebody asks her to stop her job, without having another job, it is not possible for her to take care of her family. They also need to eat.” Another civil society representatives argued: “Sensitization alone is not enough. It is important to reinforce the capacity of the cutters, to help them economically, to help them finding another job, other activities in which they can contribute in the community.” Although they were only a few, these

<sup>532</sup> See the website of Womensenews, available at <http://womensenews.org/story/genital-mutilation/140825/curb-fgm-our-project-focuses-the-cutters#.VI1c1CiQmYQ> [Last Accessed 1 October 2015].

civil society representatives explained that cutters make good money and are often the only providers of income for their families.

### 19.3 Arguments against the alternative source of income approach

However, the majority of respondents (including representatives of the government, civil society and international organizations) did not agree with the arguments in favour of this approach. They argued that according to their experience, the cutting does not provide a livelihood for those who do the actual cutting. Therefore, the respondents argued, cutters do not have to receive financial compensation or opportunities for other income-generating activities to induce them to give up the practice. They explained that according to them, practicing FGM/C "is not about the money."

#### 19.3.1 *Cutters do not earn a living*

Some respondents explained that most traditional cutters in Senegal receive a "modest fee" for performing FGM/C, i.e. between 3.000 to 5.000 CFA (between 4,50 to 7,50 euro) per girl. These respondents explained that this amount of money could not be considered a significant source of income. In addition, cutters receive sometimes material for performing the procedure, such as soap and razor blades. A representative of civil society explained: "They do not receive much. It's like a few vegetables, a bit of rice, and a little bit of money." Another representative of civil society said: "The parents don't give a lot of money for the cutting. The cutters receive some rice or perhaps some vegetables." A representative of civil society argued: "I don't think that economic reasons are one of the reasons for the cutters to decide to abandon it or not. The amount paid is very small. They receive maybe 5.000 CFA maximum. That's not a big amount of money. So the economic reason is for me not one of the reasons behind the practice." A representative of the government explained: "That approach is not a good approach, because giving money to cutters does not make sense. Because the cutters are not well paid. Sometimes they give them something for in the kitchen or cereals or a little bit of food, but they don't give them a lot. So it is not something that make them really leave the practice." A representative of civil society claimed: "It is not her real job, nobody can live from cutting. It is not a job. Some organizations think that if you give them a reward, they stop cutting. But it does not work like that. It is not a supply chain, you know. You don't produce so many young girls that you have to cut in a day or a year to make a living. It's even funny." A government representative explained: "My experience is that the cutters do not need support. They do not need an alternative source of income. They are not having a living out of that practice. They are not. Because it is a short time, a special time during the year that they are practicing it. This argument is false, it is not true." A representative of civil society said: "The cutting takes place only once a year, during a certain period. They cannot live on that." A representative of civil society explained: "It is not only about the money, it is not. Perhaps providing an alternative source of income might be an additional motivation for them to stop. But it is nothing more." A government representative explained that perform FGM/C not because of the money, but because of the "symbolic

reward.” This government representative explained that cutters have other jobs next to the cutting: “How many girls do you need to cut per year to live on that, or every day? You don’t cut every day. They do it from time to time, at a certain period. You cannot live on that. They have other sources of living.” Another representative of civil society said: “The demand is more important than the supply. Cutters are not what cause FGC. They aren’t!” Another representative of civil society said: “What people need to understand is that this cutters do not work for money. It is not for money, it is your traditional job. [...] The power and proud is important, not money.”

### 19.3.2 Power and respect

Many respondents (including representatives of civil society and international organizations) explained that not so much the financial compensation, but the fact that cutting was a honourable profession conferring respect and prestige within the community<sup>533</sup> is the problem. A representative of an international organization said: “It’s not the financial issue that is the problem. It’s the status issue that is the difficulty. This is the loss they fear the most.” Another representative of an international organization said: “When I was in the village, I found out that the power and the respect that these women have is much more important than the money they receive by doing the job. They are seen as people with knowledge, spiritual knowledge. They are very, very respected in the village, in the community in general. So that’s why it is not only about money. You know. Many of the village pay them in kind, for example with vegetables or a bag of rice. I think the trainings for them might be a good motivation, but it just has to be seen as a motivation. Not something else.” Another representative of an international organization explained: “Although FGM/C is a source of income for the cutter, it is not about the money. The power is important. The recognition in the community is important. When the cutters stop cutting, they are losing their power.” A representative of civil society explained: “They lose their leading role in the society. They lose their position and the benefits they have because of being a cutter.”

## 19.4 Pilot project in Senegal

Respondents explained that a Senegalese CSO who was in favour of this approach started a pilot project in cooperation with the Ministry of Women, Family and Children. The aim of this project was to orient cutters towards alternative sources of income and giving them resources, equipment and training to convert to an alternative profession or to start their own business. However, this ‘alternative source of income approach’ proved to be unsuccessful in Senegal because of several negative effects. In the first place, this micro-credit project and income generating activities attracted women who had never performed FGM/C. A representative of an international organization

<sup>533</sup> United Nations Population Fund and United Nations Children’s Fund, *Senegal: Human Rights Key to Ending FGM/C, Legislation is Just One Aspect of an Effective Campaign*, p. 4, available at [http://www.unfpa.org/gender/docs/fgmc\\_kit/LawSenegal.pdf](http://www.unfpa.org/gender/docs/fgmc_kit/LawSenegal.pdf) [Last Accessed 1 October 2015]. [Last Accessed 1 October 2015].

explained: "The programme stopped, because it had no effect. Each woman could come, to ask for financial support, and say that she was a cutter." Similarly, a representative of civil society said: "We have had people who came to us and said that they were cutters, but in the end they were not." A representative of civil society further explained: "If women know that they can get money from an NGO to start a business, of course they would come to you and say that there are a cutter who wants to stop the practice."

In the second place, this approach focused only on the supply of the cutters, but did not focus on the 'demand side' of the cutting. The project was for example not accompanied by awareness raising campaigns addressing the community as a whole to promote community consensus to abandon FGM/C. A civil society representative explained: "paying cutters to stop the practice did nothing to address the demand for the practice." Another civil society representative explained that: "If we only focus on the cutters and not on the others, they will continue." Further more, another representative of civil society said: "Even when the cutter received the money for an alternative profession and a woman of the community asks her to cut her daughter, she will do it." One civil society representative clearly illustrated in this regard the problems that were faced on the ground during this pilot project. When she was working in a community in the northern part of Senegal, she noticed that a baby was crying a lot. After a few days she went to the house of the mother to find out what was happening. After she had spoken with the mother she discovered that the baby underwent FGM/C, but also that a 'former cutter' performed the procedure on her daughter. This 'former cutter' received training to become a professional midwife: "They gave her money, credit, trainings in the hospital, they gave her many things. They transformed this lady to become a midwife." However, although this lady participated in the pilot project, received money and a training to adopt an alternative profession and was offered a job at the hospital, she continued to perform the FGM/C after working hours. When the civil society representative confronted the cutter with the fact that she was still performing FGM/C, while she was trained as a midwife and worked in the hospital now, the cutter explained: "The mothers come here to my house with their daughters, because the community choose me to do this. I cannot abandon this." In addition, the 'former cutter' told the civil society representative: "Because of my job in the hospital, in my house, I now have a table, a scissor, alcohol and many other things to make sure that now I do the cutting well." Another representative of civil society said: "Cutters won't stop if you give them money. They will only stop if they do not have any clients or customers any more. It is like a store. The store does not work if the customers do not come. How are you going to sell if you don't have customers in your shop? You won't be able to sell anything. This is the same. If the cutter does not have customers any more, she will do agriculture or other kinds of jobs, like all the other women. Then they will stop, because there is no new body to cut anymore." A representative of civil society explained: "I think that we need to address all those women, not just a cutter. I don't think that addressing specifically cutters will lead to people abandoning the practice at large scale."



### 19.5 Cutters as part of the community

Many respondents (including representatives of the government, civil society and international organizations) explained that cutters should not be seen in isolation, but as part of the community. A representative of an international organization explained: "This is not our approach, to target specifically the cutters. The cutter is considered part of the community." A representative of civil society said: "You need to sensitize all the people, not only the cutters." Another representative of civil society said: "In my opinion, it is not necessary to specifically target the cutters. You need to sensitize the whole community. When you give something, you have to give it to the whole community. When you do something, you should do it with the whole community." A representative of the government said: "It is not a good thing, because they are a member of their society and the community. It is better to target the community as the whole, instead of one person. The cutter is one person, but the member of the community who go with her daughter to this person is another person. I think that it is more important to empower the whole community than empower one person." For that reason, a holistic and participative approach was adopted in Senegal that reaches out to everyone in the community.<sup>534</sup>

## 20 CONCLUSION

Senegal signed and ratified all the human rights treaties that are important in relation to the practice of FGM/C. More specifically, Senegal has ratified the ICERD, ICESCR, ICCPR, CEDAW, CAT, CRC, ICRMW, CRPD, CED, ACHPR, Maputo Protocol, ACRWC and the AYC. Senegal has not made any reservations to these human rights treaties that attempt to limit or modify the scope of their obligations. This means that Senegal is under the obligation to comply with all the legal provisions set forth in these human rights treaties. The central question that guided the empirical study in Senegal is the following: *To what extent is Senegal in compliance with the human rights framework in relation to FGM/C, and which factors explain compliance and non-compliance with this framework?* An answer to the first part of this research question – the extent of compliance – will be addressed below. The second part of this research question – the factors explaining compliance and non-compliance – will be answered in the final chapter.

First of all, Senegal is under the obligation to submit periodic reports to the respective TMBs on how the rights are being implemented, but the country is not fully in compliance with this obligation. The principal objective of the human rights TMB system is to monitor compliance with the human rights obligations set forth in the human rights treaties. The practice of FGM/C in Senegal has been discussed during sessions of the following TMBs: CERD,

<sup>534</sup> United Nations Population Fund and United Nations Children's Fund, *Senegal: Human Rights Key to Ending FGM/C, Legislation is Just One Aspect of an Effective Campaign*, p. 4, available at [http://www.unfpa.org/gender/docs/fgmc\\_kit/LawSenegal.pdf](http://www.unfpa.org/gender/docs/fgmc_kit/LawSenegal.pdf) [Last Accessed 1 October 2015].

CESCR, HRC, CEDAWCee, CATCee, CRCee, ACmHPR and ACERWC. Although Senegal has been thanked for its “frank collaboration”<sup>535</sup> and “constructive dialogue”<sup>536</sup> by the TMBS, critical remarks about Senegal’s cooperation with the TMBS have been made as well. The Senegalese reports did not always contain enough information on the implementation of the provisions of the respective treaties, nor did the Senegalese reports always follow the guidelines for the preparation of reports. The Senegalese government did not always provide written replies to the list of issues (in time) and the Senegalese delegation was sometimes absent during the dialogue. But more problematic are the outstanding and overdue reports. Although the third to fifth reports to the CRCee and the third to seventh reports to the CEDAWCee were submitted in 2013, there have been (and still are) many outstanding and overdue reports. However, when periodic reports were submitted to the TMBS, Senegal lived up to the recommendation to include in their reports information about the legislation in force against FGM/C, measures taken to eliminate FGM/C, statistics on the incidence of FGM/C in the country and the progress made in this respect. Furthermore, no complaints have been submitted to TMBS concerning the practice of FGM/C, Senegal was never invited to cooperate in any inquiry procedure and the inter-State complaint procedure has never been used.

Senegal is in compliance with the obligation to embody the principle of equality of men and women in the national constitution. The Senegalese Constitution establishes the enjoyment of rights without discrimination. The preamble of the Constitution includes a denunciation of all forms of injustice, inequality and discrimination. Specific provisions of the Constitution explicitly condemn and seek to eliminate all forms of discrimination. In addition, the constitution also forbids “physical mutilations” in Article 7. This article provides that the human person is sacred and inviolable and that the State has the obligation to respect and protect it. However, there are major vacuums and gaps in the national laws when the Constitution is applied. Some national laws in Senegal remain deeply discriminatory against women, in particular in matters relating to the family. Several TMBS expressed its concern about the *de jure* and *de facto* inequality that exists between men and women in Senegalese society.<sup>537</sup>

Senegal is in compliance with the obligation to prohibit FGM/C. In 1999, the National Assembly passed law No. 99-05 modifying the Penal Code. Art. 299bis of the Penal Code criminalizes all forms of FGM/C, including the medicalization of the practice. The penalty is six months to five years

<sup>535</sup> United Nations Committee Against Torture, *Concluding Observations, Senegal*, Supplement No. 44, A/51/44, 1 May 1996, p. 19, para. 103; United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations, Senegal*, CERD/C/SEN/CO/16-18, 24 October 2012, p. 1, para. 2.

<sup>536</sup> United Nations Committee Against Torture, *Concluding Observations, Senegal*, Supplement No. 44, A/51/44, 1 May 1996, p. 19, para. 103; United Nations Committee on the Rights of the Child, *Concluding Observations, Senegal*, CRC/C/SEN/CO/2, 20 October 2006, p. 1, para. 2.

<sup>537</sup> United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations, Senegal*, E/C.12/1/Add.62, 24 September 2001, p. 3, para. 15 and p. 5 para. 38 and p. 11, para. 74; United Nations General Assembly, *Compilation Prepared by the Office of the High Commissioner of Human Rights*, A/HRC/WG.6/4/SEN/2, 18 December 2008, p. 5, para. 13.

imprisonment. The maximum penalty will be applied if FGM/C is “carried out or promoted by a person in the medical or paramedical field.” When FGM/C leads to death, the penalty will be “hard work for life.” The same punishment will be given to any person who gives instructions to FGM/C or causes FGM/C by “gifts, promises, enticements, threats, intimidation, abuse of authority or of power.” However, Senegal is not in compliance with the recommendation to ensure the effective enforcement and implementation of this law. Despite the existence of legislation criminalizing the practice, FGM/C is still practiced in Senegal with impunity. Since the adoption of the law in 1999, only a handful of individuals have been prosecuted for FGM/C. Cutters or family members that have been prosecuted did not serve the full prison sentence and were released early. Respondents (including representatives from the government, civil society and international organizations) explained that the amount of court cases is not representative for the incidence of FGM/C in Senegal, because people refuse to report FGM/C cases to the police. A representative of an international organization explained: “The law is not the problem. The law is there and the law is good. But the community does not report FGM cases to Justice.” Senegal did not establish a national mechanism for the implementation and monitoring of legislation and law enforcement, nor were ‘adequate resources’ made available for the implementation of legislative frameworks aimed at eliminating FGM/C.

Senegal is in compliance with the recommendation to develop appropriate measures, including NAPs, strategies, policies, rules and regulations aimed at preventing and eliminating FGM/C. Soon after the adoption of the national law criminalizing FGM/C, the Senegalese government developed a ‘National Plan of Action for the Abandonment of Female Genital Mutilation’ for the period 2000-2005. This NAP was evaluated in 2008 and a new ‘National Plan of Action to Accelerate the Abandonment of FGM/C’ was adopted in 2010 for the period 2010-2015. Furthermore, a medical policy was adopted in 2011 and a religious policy in 2013. Except for the first NAP, all policies are very comprehensive in nature and also multidisciplinary in scope. Although these policies (especially the NAPs) have much potential in relation to coordination of actions in the field of FGM/C in Senegal, they are not well implemented. Senegal is not in compliance in relation to the implementation of the national legislative frameworks on FGM/C. Adequate accountability mechanisms at the national and local levels to monitor adherence to and implementation of these legislative frameworks are not in place. The National Council for Promoting the Abandonment of FGM/C (*Conseil National Promotion Abandon de l’Excision*) was to be established soon after the adoption of the NAP as the political body of guidance and decision at the highest level. In addition, a National Technical Coordination Committee, a Regional Committee and a Departmental Committee were to be established. However, at the time of this research, there were many problems with regard to the implementation of this structure at different levels and none of the Councils or Committees was operative. No resources were allocated to the implementation of policies and programmes by the Senegalese government: the UNFPA-UNICEF Joint Programme allocated financial resources to the implementation of the NAPs instead.

Senegal is partly in compliance with the recommendation to collect and disseminate basic data about prevalence, trends, attitudes and behaviour

regarding FGM/C. The DHS and MICS surveys collected data in Senegal on the prevalence of FGM/C, the types of FGM/C practiced, the girl's age at the time of the procedure, the type of practitioner who performed the practice and the beliefs and opinions about FGM/C. The module with questions on FGM/C was added to the women's questionnaire in Senegal for the first time in 2005, and again in 2010-2011, 2012-2013 and for the last time in 2014. Senegal also collected data on the cases and enforcement of legislation with a study of Professor Ndiaye to get a more accurate picture of the status of implementation of Law No. 99-05 of 29 January 1999 criminalizing FGM/C in Senegal. However, respondents argued that FGM/C remains poorly documented in Senegal and expressed the need for further research and data collection on FGM/C in Senegal. Some respondents (mainly representatives of civil society) expressed their concern about the reliability of the results of the DHS and MICS surveys in relation to FGM/C, since self-reporting is the basis for determining FGM/C status.

Senegal is not in compliance with the obligation to provide necessary support to victims of FGM/C, nor with the obligation to protect women who are at risk of being subjected to FGM/C. In Senegal, there are no adequate social and/or psychological support services specifically designed for girls and women who have been subjected to FGM/C and those at risk. Respondents explained that there is a serious lack of support services for (potential) victims of FGM/C. More specifically, at the time of this research, there were no helplines, specialized shelter services or safe houses for women and girls at risk of, or escaping FGM/C. One Senegalese CSO provides emotional and psychological counselling to victims of VAW and children in general. In some cases, they also provide counselling to women and girls who are (potential) victims of FGM/C. Legal support services for women in general are offered by another CSO as well. Since 2012, reconstructive surgeries are offered in Senegal to women who underwent FGM/C.

Senegal is not in compliance with the obligation to create public awareness in all sectors of society regarding FGM/C through information, formal and information education, and outreach programmes. Awareness raising in Senegal is mainly done by CSOs and respondents were critical on the role of the government in this regard. Representatives of civil society referred often – quite frustrated – to meetings or workshops organized by the government to talk about FGM/C “in wonderful hotels in Dakar or Saly” while they could not see how this would directly help the communities on the ground. Awareness about FGM/C at the community level is raised by CSOs and efforts of International Organizations, not by the Senegalese government. In addition, according to the respondents, the government does not recognize the role that CSOs play in the movement to eliminate FGM/C, nor does the government give CSOs all necessary (financial) support and encouragement. Many respondents (including representatives of the government, international organizations, and civil society) explained that awareness of FGM/C is not integrated in the curricula of (medical, legal, social work) students. There are no training programmes for health professionals (doctors, nurses, midwives, psychologists) to detect, manage and counsel FGM/C. Non-formal and informal educational activities and trainings on FGM/C are sporadically provided in the relevant sectors. The government does not promote gender-sensitive, empowering educational

processes. If initiatives are taken in this regard, the initiative is taken by UN agencies or CSOs.

Senegal is partly in compliance with the recommendation to engage a wide range of stakeholders. Many actors are involved in the action taken against FGM/C. However, this is not because the government engages these stakeholders, but it is mostly because of the work of the UNFPA-UNICEF Joint Programme and CSOs themselves. CSOs try to involve community leaders, religious leaders, men and boys in their advocacy and awareness-raising campaigns.

Senegal complied with the recommendation to explore alternatives to FGM/C and to support and provide alternative training and education possibilities for cutters, in order to convert them to an alternative profession. In cooperation with the Ministry of Women, Family and Children, a Senegalese CSO started a pilot project. However, this 'alternative source of income approach' proved to be an unsuccessful strategy in Senegal. Therefore, training programmes or alternative livelihoods for local practitioners of FGM/C are not (any more) provided in Senegal.

Taking into account the above, Senegal is only to a limited extent in compliance with the human rights framework that is designed to eliminate the practice of FGM/C.

## **PART IV**

### **CONCLUSIONS**



# CHAPTER VI

## FINAL CONCLUSIONS

### 1 INTRODUCTION

This research addresses the practice of Female Genital Mutilation/Cutting (FGM/C). Over the last decades, discourse on the elimination of FGM/C is positioned within the scope of international and regional human rights law. The practice is considered a form of Violence Against Women (VAW) and a human rights violation. FGM/C violates the right to be free from gender-discrimination, the right to the highest attainable standard of health, the right to life (when the procedure results in death), the right to freedom from torture or cruel, inhuman or degrading treatment or punishment and the rights of the child. These human rights are enshrined in various human rights treaties that are legally binding upon States that have ratified them. Among others, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the African Charter on Human and Peoples' Rights (ACHPR), also known as the "Banjul Charter," the Protocol to the ACHPR on the Rights of Women in Africa ("Maputo Protocol")<sup>1</sup> and the African Charter on the Rights and Welfare of the Child (ACRWC) are important. These human rights instruments contain provisions under which FGM/C constitute a violation of human rights, and oblige States parties to take measures to prevent and eliminate the practice. In addition to these hard law instruments, the practice of FGM/C has been specifically addressed in many soft law instruments, including in Declarations, Programmes and Plans of Action, General Recommendations (GR) and General Comments (GC) of Treaty Monitoring Bodies, and non-binding resolutions. However, despite the various international and regional (quasi) legal norms addressing the practice of FGM/C, the prevalence rates have remained high in many of the countries where FGM/C occurs, and in some countries there is even an increase in prevalence rate. In Senegal, the prevalence rate has not decreased significantly either. This raises the question to what extent (and why) States comply, or in the case of FGM/C, appear not to comply, with the human rights framework. The central question of this research was the following:

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<sup>1</sup> Especially the ratification of the Maputo Protocol is important, since it is the only legally binding human rights instrument applicable in Africa in which FGM/C is specifically mentioned. Many African States (with a high FGM/C prevalence rate) have not ratified the Protocol, including Somalia (98%), Egypt (91%), Eritrea (89%), Sierra Leone (88%), Sudan (88%), Ethiopia (74%), Chad (44%), CAR (24%) and Niger (2%).



*Which factors explain compliance and/or non-compliance with the human rights framework in relation to the practice of Female Genital Mutilation/Cutting in Senegal?*

The structure of this chapter is as follows. It starts with the commitment of the Senegalese government in relation to the human rights framework in general (section 2.1) and the practice of FGM/C in particular (section 2.2). Section 3 will elaborate on the elimination of the practice in Senegal. In section 4, a short analysis will follow about the extent of compliance. In section 5, an overview will be provided of the factors that explain the extent of compliance, while linking the compliance theories described in the theoretical framework and the results of the empirical study in Senegal. Section 6 will elaborate on how the factors that influence compliance positively and/or negatively interact with each other and concluding remarks are spelled out in section 7.

## **2 STRONG GOVERNMENT COMMITMENT**

### **2.1 Commitment to the human rights framework in general**

The Senegalese government stated at many occasions that they have a longstanding commitment to democracy and a tradition of promoting, protecting and respecting human rights and fundamental freedoms. According to the Senegalese government, there is a sincere desire and political will to protect their citizens against human rights violations and to improve the human rights condition on the ground. Senegal took active part in the international human rights movement and helped to codify international human rights law by participating in the drafting process of several human rights treaties, including the CRC and the ACHPR. Senegal ratified all international and regional human rights treaties (often as one of the first African countries) that are important in relation to the practice of FGM/C. The preamble of the Senegalese constitution explicitly affirms the State's adherence to several international human rights treaties, notably the Universal Declaration of Human Rights (UDHR), the CEDAW, CRC and the ACHPR. It was one of the founding members of the Organisation of Africa Unity (OAU) and the capital city Dakar hosted important meetings in relation to human rights development. Senegalese nationals held prominent positions in international human rights work.

Not only the State of Senegal itself, but also the Treaty Monitoring Bodies (TMBs) describe Senegal as a tolerant country that promotes human rights. Senegal has been commended for its efforts to establish a democratic State based on the rule of law and their "obvious commitment to human rights."<sup>2</sup> The Human Rights Committee (HRC) noted that the Government and people of Senegal were "deeply attached to the principle of respect for human rights."<sup>3</sup> Similarly, during the Universal Periodic Review (UPR), several States

<sup>2</sup> United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations, Senegal*, Supplement No. 18, A/49/18, 17 August 1994, p. 53, para. 335.

<sup>3</sup> United Nations Human Rights Committee, *Concluding Observations, Senegal*, A/42/40(para. 197-238), 6 April 1987, p. 59, para. 220.

commended Senegal for the “ongoing commitment of Senegal to creating a human rights culture.”<sup>4</sup>

Respondents were also well aware of the strong ratification record of Senegal and referred to Senegal as the “champion of ratification in Africa.” They argued that Senegal’s ratification behaviour bears witness to the political will of the Senegalese authorities to protect the citizens of their country against human rights violations. Respondents also described Senegal as “a country of human rights” and claimed that human rights were deeply rooted in the Senegalese culture since the independence of the country. A representative of civil society stated: “I believe that the State of Senegal has a mentality, a willingness to respect human rights.”

## 2.2 Commitment to end the practice of FGM/C

Political commitment in relation to national efforts to eliminate FGM/C in Senegal grew over time. In 1984, President Abdou Diouf of Senegal declared at the opening of a seminar in Dakar on traditional practices affecting the health of mothers and children, that the “decline of the survival of excision should be accelerated through education, not anathema.”<sup>5</sup> From the 1980s onwards, Senegal hosted many important conferences and seminars on harmful traditional practices in general and FGM/C specifically. During these meetings, different topics related to FGM/C were discussed, including strategies to eliminate FGM/C, Islam and FGM/C, medical consequences of the practice, the role of national Parliaments, cross-border approaches to tackle FGM/C, and lessons learned about FGM/C prevention. Representatives of many African countries attended these conferences. In 1997, the Senegalese Minister of Health launched a prevention campaign against FGM/C and a couple of months later President Abdou Diouf publicly proclaimed its commitment to end the practice of FGM/C and openly took a stand against it. Since then, the Senegalese government has stated in many occasions that it is very committed to end the practice. In the *National Plan of Action to Accelerate the Abandonment of FGM/C (2010-2015)* the Senegalese government articulated for example: “The State of Senegal strongly expressed its will to protect girls and women against all abuses and violence of any kind through the ratification of international conventions and instruments.”<sup>6</sup> According to the UNFPA-UNICEF Joint Programme in Senegal, there is a “strong commitment” and “strong political will” at the government level to take action in the field of FGM/C.<sup>7</sup> Similarly,

<sup>4</sup> United Nations General Assembly, *Report of the Working Group on the Universal Periodic Review on Senegal*, A/HRC/25/4, 11 December 2013, para. 38.

<sup>5</sup> Statement by the President of Senegal, Abdou Diouf on sexual mutilation: “Accélérer le dépérissement de cette survivance qu’est l’excision par l’éducation et non par l’anathème,” see bulletin of the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children, No. 2, July 1986, p.15.

<sup>6</sup> National Plan of Action to Accelerate the Abandonment of Excision 2010-2015 (Original in French: *Plan d’Action National pour l’Acceleration de l’Abandon de l’Excision 2010-2015*), Ministry of the Family, National Solidarity and Female Entrepreneurship, February 2010, p. 2.

<sup>7</sup> United Nations Population Fund and United Nations Children’s Fund, *Joint Evaluation of the UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change (2008-2012) – Senegal* (Original in French: *Évaluation Conjointe du Programme Conjoint UNFPA-UNICEF sur les*

some respondents also mentioned that there is “institutional engagement,” “political will” and “commitment” of the Senegalese government to promote women’s rights and to take action against FGM/C.

### 3 ELIMINATION OF FGM/C IN SENEGAL

Senegal has often been referred to as a “promising practice” in relation to the elimination of FGM/C. The country has been earmarked as a “pioneer in West Africa”<sup>8</sup> in relation to the elimination of the practice, mainly because Senegal was the first country in which a series of public declarations of FGM/C abandonment were made.<sup>9</sup> According to the 2011 Annual Report of the UNFPA-UNICEF Joint Programme: “Of the 15 countries active in the Joint Programme, Senegal has made the most rapid progress toward the abandonment of FGM/C.”<sup>10</sup>

The Senegalese government is very optimistic about the progress made in relation to the elimination of FGM/C in the country. In the first place, the government of Senegal claims in the national reports submitted to the TMBs and the UPR that “significant progress,”<sup>11</sup> “giant steps”<sup>12</sup> have been made and “significant results have been achieved”<sup>13</sup> in relation to the elimination of FGM/C in Senegal. The State explained in their reports that sustained efforts at awareness-raising, training and support among the general public have resulted in abandonment of the practice in 75% of 5000 surveyed communities in Senegal.<sup>14</sup> The Senegalese government claimed that trends show a marked decrease of FGM/C in the country “with thousands of communities having publicly renounced it.”<sup>15</sup> This decline is, according to the government, “a result of the mobilization of women’s groups, NGOs, development partners and the

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*Mutilations Génitales Féminines/Excision: Accélérer le Changement (2008-2012) – Sénégal*, New York, July 2013, p. ix.

<sup>8</sup> United Nations Population Fund and United Nations Children’s Fund, *Joint Evaluation of the UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change (2008-2012) – Senegal* (Original in French: *Évaluation Conjointe du Programme Conjoint UNFPA-UNICEF sur les Mutilations Génitales Féminines/Excision: Accélérer le Changement (2008-2012) – Sénégal*), New York, July 2013, p. 16.

<sup>9</sup> United Nations Population Fund and United Nations Children’s Fund, *UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change, Annual Report 2011*, p. 5, available at [http://www.unfpa.org/sites/default/files/pub-pdf/Annual\\_report\\_on\\_FGM-C\\_2011\\_low\\_res.pdf](http://www.unfpa.org/sites/default/files/pub-pdf/Annual_report_on_FGM-C_2011_low_res.pdf) [Last Accessed 1 October 2015].

<sup>10</sup> *Ibid.*, p. 8.

<sup>11</sup> United Nations Committee Against Torture, *Summary Record of the 1109th Meeting*, CAT/C/SR.1109, 13 November 2012, p. 9, para. 69; United Nations Committee on the Rights of the Child, *Written Replies by the Government of Senegal to the List of Issues Relating to the Consideration of the Second Periodic Report of Senegal*, CRC/C/SEN/Q/2/Add.1, 10 August 2006, p. 22.

<sup>12</sup> African Committee of Experts on the Rights and Welfare of the Child, *Initial, First and Second Report of Senegal (1998-2009)*, 2009, p. 27.

<sup>13</sup> United Nations General Assembly, *National Report of Senegal*, Human Rights Council, A/HRC/WG.6/17/SEN/1, 23 July 2013, para. 24.

<sup>14</sup> United Nations General Assembly, *National Report of Senegal, Addendum*, Human Rights Council, A/HRC/11/24/Add.1, 8 June 2009, p. 3; United Nations General Assembly, *Report of the Working Group on the Universal Periodic Review on Senegal*, A/HRC/25/4, 11 December 2013, para. 57.

<sup>15</sup> United Nations General Assembly, *National Report of Senegal*, Human Rights Council, A/HRC/WG.6/17/SEN/1, 23 July 2013, para. 23.

Government to conduct awareness- raising, research and advocacy activities.”<sup>16</sup> The government wrote that this groundswell towards public renunciation of FGM/C in the country makes Senegal “a model country at the international level.”<sup>17</sup> The Senegalese government at the same time acknowledged that there are still some “pockets of resistance” (especially in the North of Senegal and in Vélingara)<sup>18</sup> where FGM/C is still strongly defended.<sup>19</sup> In addition, Senegal made optimistic estimations in relation to when FGM/C would be eliminated in the country. In the first *National Plan of Action for the Abandonment of Female Genital Mutilation (2000-2005)*, the general objective of the Senegalese government was the total elimination of FGM/C in the country by the year 2005.<sup>20</sup> In the second *National Plan of Action to Accelerate the Abandonment of FGM/C (2010-2015)*, the Government reported the expectation that by 2015 “total eradication of excision would have been achieved.”<sup>21</sup> However, this proved to be overly optimistic.

The human rights-based programme of the Civil Society Organization (CSO) Tostan has been praised and is often cited as a ‘best practice’<sup>22</sup> and as one of the most effective programs for shifting community attitudes towards the elimination of FGM/C. The Population Reference Bureau has endorsed Tostan’s human rights-based model<sup>23</sup> and the Government of Senegal and the Government of The Gambia recognized the Tostan model as the preferred approach for promoting the abandonment of FGM/C. The establishment of the UNFPA-UNICEF Joint Programme on FGM/C was also based on the experiences and the approach of Tostan. According to various reports of UNICEF, Tostan’s Community Empowerment Programme (CEP) has achieved “notable success” in the communities in which it has been implemented.<sup>24</sup> In 2007, UNICEF sponsored a study of communities where the Tostan program had been implemented. Researchers found, on average, a 77% abandonment

<sup>16</sup> United Nations Committee on the Elimination of Discrimination Against Women, *Combined Third to Seventh Periodic Reports of Senegal*, CEDAW/C/SEN/3-7, 13 December 2013, p. 61, para. 127.

<sup>17</sup> United Nations Committee on the Rights of the Child, *Written Replies by the Government of Senegal to the List of Issues Relating to the Consideration of the Second Periodic Report of Senegal*, CRC/C/SEN/Q/2/Add.1, 10 August 2006, p. 20.

<sup>18</sup> Vélingara is a town in the Southern part of Senegal (Kolda region).

<sup>19</sup> African Committee of Experts on the Rights and Welfare of the Child, *Initial, First and Second Report of Senegal (1998-2009)*, 2009, p. 27.

<sup>20</sup> National Plan of Action for the Abandonment of Female Genital Mutilation (Original in French: *Plan d’Action National pour l’Abandon de la Pratique des Mutilations Genitales Feminines*), Ministry of the Family and National Solidarity, March 2001, p. 24.

<sup>21</sup> African Committee of Experts on the Rights and Welfare of the Child, *Initial, First and Second Report of Senegal (1998-2009)*, 2009, p. 27.

<sup>22</sup> C. Feldman-Jacobs and S. Ryniak, *Abandoning Female Genital Mutilation/Cutting: An In-Depth Look at Promising Practices*, Population Reference Bureau, USAID, December 2006, available at [http://www.prb.org/pdf07/fgm-c\\_report.pdf](http://www.prb.org/pdf07/fgm-c_report.pdf) [Last Accessed 1 October 2015].

<sup>23</sup> K. Gryboski et al., Working With the Community for Improved Health, *Health Bulletin*, No. 3, Washington, DC: Population Reference Bureau, 2006, p. 16-19.

<sup>24</sup> United Nations Children’s Fund, *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting*, UNICEF Innocenti Research Centre, 2005, p. 23-24; N.J. Diop et al., *Evaluation of the Long-term Impact of the TOSTAN Programme on the Abandonment of FGM/C and Early Marriage: Results from a Qualitative study in Senegal*, Population Council, January 2008, p. 30.

rate of FGM/C in Tostan-trained communities.<sup>25</sup> In the past decade, the Tostan approach is being replicated in other African countries. According to the UNFPA-UNICEF Joint Programme, it has scaled up methodologies similar to the model developed by Tostan: “Based on the programme’s good practice and demonstrated results, additional countries are adapting the model to their specific social, ethnic and cultural context to promote the abandonment of FGM/C.”<sup>26</sup> To date, over 7,000 communities in Africa (including Djibouti, Guinea, Guinea-Bissau, Mali, Mauritania, Senegal, Somalia, and The Gambia) have publicly declared their decision to abandon FGM/C, according to Tostan.<sup>27</sup>

However, careful analysis of the Demographic and Health Surveys (DHS) and Multiple Indicator Cluster Surveys (MICS) regarding Senegal shows that the national prevalence of FGM/C is not declining as rapidly as the UNFPA-UNICEF Joint Programme, the Senegalese government and Tostan might have hoped for. The national prevalence of FGM/C among girls and women of reproductive age (15 to 49 years) remained fairly constant in the past decade. Between 2005 and 2014 the national prevalence of FGM/C declined in Senegal with 3.5% (from 28.2% in 2005 to 24.7% in 2014). Since FGM/C is performed on very young girls in Senegal, recently the DHS has begun to collect data on the prevalence among girls younger than 15 years. According to the statistics of the DHS 2012-2013, 17.5% of all girls under 15 had – according to the statements of their mothers – undergone FGM/C. According to the Senegal DHS-2014, this proportion was 12.9%, which might indicate a decrease in the practice among young girls in Senegal. In the vast majority of cases (91.4%), a traditional practitioner performed FGM/C on girls and women, although there are increasing rumours of medicalization of the practice in Senegal. In relation to the type of FGM/C performed, the past years showed a trend towards less severe cutting and there is also a trend observable towards performing FGM/C at younger girls in Senegal.

Overall, according to the statistics of the DHS and MICS surveys, FGM/C is today still commonly practiced in Senegal among the Mandingue, the Poular, the Diola, and the Soninké ethnic groups and remains widespread in the regions of Kédougou, Matam, Sédhiou, Tambacounda and Kolda.<sup>28</sup> At the same time, it should be noted that the majority of Senegalese women (Serer and Wolof ethnic groups) did not undergo the practice of FGM/C.

<sup>25</sup> Tostan, *Tostan: Community-Led Development*, Brochure, 2009, p. 17, available at <http://www.tostan.org/sites/default/files/resources/tostan%20brochure.pdf> [Last Accessed 1 October 2015].

<sup>26</sup> See United Nations Women Watch, *UNFPA: Good Practice Example 1*, available at <http://www.un.org/womenwatch/feature/ruralwomen/unfpa-good-practice.html> [Last Accessed 1 October 2015].

<sup>27</sup> See website Tostan, *Cross-Cutting Issues*, available at <http://www.tostan.org/female-genital-cutting> [Last Accessed 1 October 2015].

<sup>28</sup> See Annex I for a map of Senegal.

#### 4 THE EXTENT OF COMPLIANCE IS LIMITED

In line with the statistics of the DHS and MICS in relation to the national prevalence of FGM/C, many TMBs also expressed their concern about the persistence of the practice in Senegal.<sup>29</sup> The HRC noted for example that “the persistence of certain customs [...] hinder Senegal's full compliance with its obligations under the Covenant.”<sup>30</sup> The CESCR was concerned that FGM/C was still practiced with impunity,<sup>31</sup> despite the existence of legislation banning FGM/C, and urged Senegal to enforce the existing legislation against FGM/C.<sup>32</sup> The CATCee recommended Senegal to continue to publicize Act No. 99-05 of 29 January 1999 on the penalization of FGM/C and to run awareness and information campaigns for the general public and law-enforcement officers.<sup>33</sup> Also during the UPR, several UN Member States expressed their concern that legislation was not translated into concrete results for women and girls. They noted that FGM/C remains common in Senegal<sup>34</sup> and recommended Senegal to enforce or implement more effectively the provisions of law 99-05 prohibiting FGM/C.

Along the same lines, an overwhelming majority of the respondents similarly expressed their concern during the interviews about the gap between Senegal's propensity to join international and regional human rights treaties on the one hand, and to bring their human rights practice into compliance with those treaties on the other. Specifically in relation to FGM/C, the majority of respondents (mostly representatives of international organizations and civil society, but also some representatives of the government) argued that they do not see the commitment of the Senegalese government to take steps to eliminate FGM/C in reality. A representative of an international organization argued for example: “The fact that Senegal has been ratifying all these treaties and conventions doesn't mean that the human rights situation on the ground is much better compared to the human rights situation of other similar countries in the region.” A representative of civil society said: “We ratify a lot, but the implementation is very limited, sometimes even non-existent.”

Chapter V indeed showed that Senegal is only to a limited extent in compliance with the human rights framework in relation to the practice of

<sup>29</sup> United Nations Committee on the Elimination of Discrimination Against Women, *Concluding Observations, Senegal*, A/49/38(SUPP) para. 666-728, 12 April 1994, p. 127, para. 721; United Nations Committee Against Torture, *Concluding Observations, Senegal*, CAT/C/SEN/CO/3, 17 January 2013, p. 5, para. 14; United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations, Senegal*, E/C.12/1/Add.62, 24 September 2001, p. 2, para. 11. Committee on the Rights of the Child, *Concluding Observations, Senegal*, CRC/C/SEN/CO/2, 20 October 2006, p. 3, para. 7 and p. 11, para. 50.

<sup>30</sup> United Nations Human Rights Committee, *Concluding Observations, Senegal*, CCPR/C/79/Add.10, 28 December 1992, p. 2, para. 4.

<sup>31</sup> United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations, Senegal*, E/C.12/1/Add.62, 24 September 2001, p. 4, para. 24.

<sup>32</sup> *Ibid.*, p. 5, para. 39.

<sup>33</sup> United Nations Committee Against Torture, *Concluding Observations, Senegal*, CAT/C/SEN/CO/3, 17 January 2013, p. 5, para. 14.

<sup>34</sup> Advance Questions to Senegal – Addendum, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/SNQuestions.aspx> [Last Accessed 1 October 2015].

FGM/C. At first glance, the extent of compliance might seem rather promising: the Senegalese Constitution establishes the enjoyment of rights without discrimination, an impressive institutional framework has been established consisting of many NHRI that are involved in the promotion and protection of human rights, a national law criminalizing FGM/C is adopted in 1999, National Action Plans (NAPs) and many other policies have been adopted aimed at preventing and eliminating FGM/C, and CSOs are actively involved as regards to awareness raising at the community level. However, FGM/C is still practiced in Senegal with impunity. Despite the existence of legislation criminalizing the practice, the law is not sufficiently implemented nor enforced. Only a handful of individuals have been prosecuted for FGM/C since the adoption of the law in 1999. Cutters or family members that have been prosecuted did not serve the full prison sentence and were released early. Although NAPs and other policies have much potential in relation to coordination of actions in the field of FGM/C, these policies are not well implemented. There is no national mechanism in place for the implementation and monitoring of legislation, law enforcement and policies, nor are government resources made available for the elimination of FGM/C. Adequate social and/or psychological support services are not available for girls and women who have been subjected to FGM/C and those at risk. Awareness of FGM/C is not integrated in the curricula of (medical, legal, social work) students. There are no training programmes for health professionals (doctors, nurses, midwives, psychologists) to detect, manage and counsel FGM/C. Non-formal and informal educational activities and trainings on FGM/C are sporadically provided in the relevant sectors.

Thus, there are major gaps between the *de jure* and *de facto* compliance in Senegal. Enacting laws and adopting policies is the beginning, but not the end. Although there is probably not a single country in the world that has a perfect human rights record, nor is in full compliance with the human rights framework in relation to FGM/C, the level of compliance in Senegal proved to be (disappointingly) limited. The next section will provide an answer to the central question. The factors described in the theoretical framework of this research (Chapter II) will be linked with the results of the empirical study in Senegal (Chapter V). Below, an analysis of the nine factors that explain compliance and/or non-compliance with the human rights framework in relation to FGM/C in Senegal will be provided.

## 5. FACTORS EXPLAINING COMPLIANCE AND/OR NON-COMPLIANCE

First of all, not all factors that follow from IL and IR theories were found in Senegal. Several IL theories pointed to *ambiguity in treaty language* as a factor that explains non-compliance. In Franck's legitimacy theory, rule-clarity and textual determinacy is seen as the necessary first step towards compliance. According to Franck, indeterminate rules make it harder to know what is expected, but also make it easier to justify non-compliance.<sup>35</sup> Similarly, Chayes

<sup>35</sup> T.M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, 1990, p. 54; T.M. Franck, Legitimacy in the International System, *American Journal of International Law*, Volume 82, 1988, p. 714.

& Chayes argued that the language of international law is often “unable to capture meaning with precision,”<sup>36</sup> which can create a “zone of ambiguity within which it is difficult to say with precision what is permitted and what forbidden.”<sup>37</sup> According to Chayes & Chayes, States take advantage of the indeterminacy of treaty language to justify a broad interpretation of treaty provisions. In that way, many States seek to discover the limits of their treaty obligations.<sup>38</sup> Other scholars have equally stated that the human rights described in international treaties are “invariably vague and ambiguous.”<sup>39</sup>

It is indeed true that provisions that are important in relation to the elimination of the practice of FGM/C in both the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) have considerable interpretive space. For example, Article 2(f) of the CEDAW obligates States Parties to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women” and Article 5(a) of the CEDAW obliges States Parties to “take all appropriate measures to modify the social and cultural patterns of conduct of men and women.” Similarly, Article 24(3) of the CRC requires States Parties to “take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.” Both the CEDAW and CRC do not define what “effective” or “appropriate” measures are, nor do both Conventions provide guidance as to what it exactly means to “modify” social and cultural “patterns of conduct.” However, the Vienna Convention on the Law of Treaties (VCLT) sets forth the general rules of treaty interpretation. Article 31(1) establishes the guiding principle that a treaty shall be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>40</sup>

The case study in Senegal showed, however, that the Senegalese government knows exactly what is expected from them in relation to the elimination of FGM/C. Although the treaty language in the provisions of the CEDAW and CRC are general, arguably a bit vague and imposes broad obligations upon States, it was for the Senegalese State clear what the object and purpose, or to use the words of Chayes & Chayes what the “spirit”<sup>41</sup> of the legally binding treaty obligations (and non-binding recommendations following from soft-law instruments) contain. The respondents never mentioned that the ambiguity of treaty language is a problem in relation to the ‘compliance question’. In addition, the reports submitted to TMBs also provide evidence that Senegal knows precisely what is expected from them; since the State clearly reported

<sup>36</sup> A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements*, Harvard University Press, 1995, p. 10.

<sup>37</sup> *Ibid.*, p. 10-11.

<sup>38</sup> *Ibid.*, p. 11-13.

<sup>39</sup> J. Tobin, Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation, *Harvard Human Rights Journal*, Volume 23, No. 1, 2010, p. 1.

<sup>40</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, Volume 1155, p. 331, Article 31(1).

<sup>41</sup> A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements*, Harvard University Press, 1995, p. 13.



which “appropriate” measures were taken in relation to the elimination of the practice.

Secondly, several IL and IR theories pointed to the *lack of national capacity and resources* as a factor that explains non-compliance. According to Henkin’s compliance theory, national institutions could hinder State compliance with international law.<sup>42</sup> Henkin explains that international law is sometimes violated when the governmental machinery is inadequate, when administration is ineffective, when departments responsible for carrying out undertakings are remiss in doing so.<sup>43</sup> Similarly, the managerial theory of Chayes & Chayes explains that States (sometimes) unwillingly violate international law, because of existing deficits in domestic regulatory capacity.<sup>44</sup> These deficits could be a lack of scientific, technical, bureaucratic, and financial resources to build effective domestic enforcement systems. For that reason, one of the elements of the managerial theory of Chayes & Chayes is building capacity (or “technical assistance”) to enable non-complying States to act in accordance with international law.<sup>45</sup> The ‘renewed’ spiral model of Risse, Ropp and Sikkink also included the institutional (in)capacity as an explanation for (non-)compliance with human rights norms.<sup>46</sup>

The lack of national capacity and resources is indeed an important factor hampering compliance with the human right framework in relation to FGM/C in Senegal. The Senegalese government has mandated the Department of the Family (*Direction de la Famille*) of the Ministry of Women, Family and Children (*Ministre de la Femme, de la Famille et de l’Enfance*) to be the coordinating body to take action in the field of FGM/C. They are responsible for the implementation of the National Action Plans and must coordinate activities at the strategic and technical level. However, there is a lack of human, financial and material resources at this Department. The weak capacity of the Department of the Family and the lack of ownership, coordination and cooperation at the national level (with other Ministries, but also with other actors in the field) contributes to non-compliance with the human rights framework. One of the explanations for the problems at the Department of the Family is the institutional instability and the lack of continuity, caused by the frequent change of the government. In addition, another major problem is inadequate resource mobilization. The Senegalese government did not allocate sufficient budgets for the implementation of policies on FGM/C; the National Action Plans on FGM/C are, for example, completely unfunded by the State (but the UNFPA-UNICEF Joint Programme, among others, provided financial support instead).

Not only at the Ministerial level this lack of capacity proved to be a problem, but also in relation to the National Human Rights Institutions (NHRIs) at the

<sup>42</sup> L. Henkin, *How Nations Behave: Law and Foreign Policy*, New York, Columbia University Press, 2<sup>nd</sup> edition, 1979, p. 60.

<sup>43</sup> *Ibid.*, p. 74-76.

<sup>44</sup> A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements*, Harvard University Press, 1995, p. 14-15.

<sup>45</sup> *Ibid.*, p. 25.

<sup>46</sup> E.S. Bates, Sophisticated Constructivism in Human Rights Compliance Theory, *The European Journal of International Law*, Volume 25, No. 4, 2015, p. 1171.

national level. The Senegalese authorities have established an impressive institutional framework consisting of many NHRIs that are involved in the promotion and protection of human rights, including the High Commissioner for Human Rights and the Promotion of Peace (*Haut Commissariat aux Droits de l'Homme et à la Promotion de la Paix*), the Senegalese Human Rights Committee (*Comité Sénégalais des Droits de l'Homme*), the Inter-Ministerial Committee on Human Rights and International Humanitarian Law (*Comité Inter-Ministériel des Droits de l'Homme et du Droit International Humanitaire*), the National Human Rights Advisory Council (*Conseil Consultatif National des Droits de l'Homme*), and the Office of the Ombudsman (*Médiateur*). All NHRIs deal with matters concerning the implementation of international and regional human rights law. However, there is not a clear division of tasks or coordination between these institutions. Respondents expressed their doubts about the functioning of these NHRIs. Indeed, what matters is not the number of institutions, but the actions they take and the work they deliver. Unfortunately, the work of the NHRIs in Senegal leaves much to be desired, which was also confirmed when the Senegalese Human Rights Committee lost its “A” status for non-compliance with the ‘Paris Principles’.<sup>47</sup> The Senegalese Human Rights Committee was downgraded to “B” status (not fully in compliance with the Paris Principles), mainly because the independence of the institution was at stake.

According to Chayes & Chayes’ managerial theory, capacity building has a major function in enabling countries to comply with the requirements of a certain treaty. Capacity building is indeed an important factor that enhanced the process of compliance in Senegal. The technical and financial support of international organizations contributed greatly toward compliance. In the first place, UNICEF tried to reinforce the capacity of the Department of the Family by offering one UNICEF employee to work fulltime at the Department, with the aim to push the agenda on FGM/C forward. In the second place, the adoption of policies in relation to FGM/C in Senegal was mainly an effort of the UNFPA-UNICEF Joint Programme and CSOs. One respondent argued for example: “It [the National Action Plan] should be a government document, but that is not the case now. This National Action Plan was an effort of the UN partners.” In the third place, the technical and financial support of the West Africa Regional Office of the Office of the United Nations High Commissioner for Human Rights (OHCHR) was important. The OHCHR provided a consultant to the Ministry of Women, Family and Children to support the drafting of periodic reports and to organize a validation workshop. Respondents argued that the support of the OHCHR contributed substantially in submitting the third to seventh reports to the Committee on the Elimination of Discrimination Against Women (CEDAWCee) and the third to fifth reports to the Committee on the Rights of the Child (CRCee) in 2013.

<sup>47</sup> The Paris Principles are a set of core minimum recommendations relating to the status and functioning of national institutions for the protection and promotion of human rights. The Paris Principles are set out in United Nations General Assembly, *Resolution 48/134 on National Institutions for the Promotion and Protection of Human Rights*, A/RES/48/134, 20 December 1993.

In the third place, several IL and IR theories pointed to a *lack of deterrence* and the *fear for punishment and sanctions* as factors that explain compliance and non-compliance. Henkin noted for example in his compliance theory that if the only response to violation of a treaty is termination of that specific clause or article, the State might not be likely to be deterred from violating that provision.<sup>48</sup> Franck also hints in that direction when he asks the question: “why do powerful nations obey powerless rules?”<sup>49</sup> Franck also mentions the absence of a coercive authority, or in his words the absence of a “global sheriff” in his legitimacy theory. According to realists, the international system lacks an authoritative government or a central authority. There is, according to them, no common power that can enact and enforce rules of behaviour. However, institutionalists argue that international institutions do enhance compliance,<sup>50</sup> mainly because States’ do care about the threat of sanctions.<sup>51</sup>

The human rights TMB system is established to monitor compliance with human rights standards. Although periodic reporting to TMBs is a key legal obligation, late reporting and outright failure to submit reports to TMB have been persistent characteristics of the TMB system.<sup>52</sup> Senegal is not in compliance with reporting obligations, since the last three decades have shown extreme delays in the submission of periodic reports. It took the Senegalese government for example 22 years to submit the third to seventh periodic report to the CEDAWCee and the fifth report to the HRC is overdue since 2000. This is not only the case for the UN TMB system, but also for the African Union (AU) monitoring system. However, Senegal is not an exception. Research has shown that only 16% of States parties report on time and when counted with a one-year grace period after the established deadline, still only one-third of reports were submitted on time.<sup>53</sup> Senegal has been requested by several TMBs to include in their reports information on the measures taken to eliminate FGM/C in the country. In addition, TMBs have offered recommendations and practical suggestions to this end. However, a weakness of the monitoring mechanism is the lack of incentive to report on one’s own wrongdoings. Senegal was overly optimistic in their reports to the TMBs and the UPR about the measures taken and the progress made in relation to the elimination of FGM/C. In quite a lot of national reports, the information provided by the Government of Senegal did not correspond with reality. For example, Senegal Stated in the second report to the UPR that important results have been achieved, more specifically “a 25.7

<sup>48</sup> L. Henkin, *How Nations Behave: Law and Foreign Policy*, New York, Columbia University Press, 2<sup>nd</sup> edition, 1979, p. 77.

<sup>49</sup> T.M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, 1990, p. 3.

<sup>50</sup> O.A. Hathaway, ‘Do Human Rights Treaties Make a Difference?’, *Yale Law Journal*, Volume 112, 2002, p. 1950.

<sup>51</sup> *Ibid*, p. 1951.

<sup>52</sup> M. O’Flaherty and C. O’Brien, Reform of UN Human Rights Treaty Monitoring Bodies: A Critique of the Concept Paper on the High Commissioner’s Proposal for a Unified Standing Treaty Body, *Human Rights Law Review*, Volume 7, No. 1, 2007, p. 141.

<sup>53</sup> N. Pillay, *Strengthening the United Nations Human Rights Treaty Body System, A Report by the United Nations High Commissioner for Human Rights*, June 2012, p. 21, available at <http://www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening.pdf> [Last Accessed 1 October 2015].

per cent reduction in the national female genital mutilation prevalence rate.”<sup>54</sup> This is incorrect, since this percentage is the national prevalence rate, not a *reduction* in the national prevalence rate. TMBs have little power to force States to comply with the procedures and concerns have been expressed about the monitoring system’s effectiveness. The UN and AU monitoring mechanisms are, to a large extent, powerless to punish Senegal when it is not in compliance. There is indeed a lack of sufficient deterrence or coercive enforcement at the international and regional level. However, if deterrence or coercive enforcement will be present, this will not (automatically) lead to compliance.

In the fourth place, several IL and IR theories pointed to *reputation* as a factor that explains compliance. Henkin explained in his compliance theory that States comply with international law, because of “foreign policy factors.” He argued that States desire their relations with other countries to be orderly and friendly.<sup>55</sup> States do not like to be accused or criticized by other States and violations between two States will negatively influence their relations. According to Henkin, considerations regarding “honour,” “prestige,” “leadership,” “influence,” “stability,” “reliability” and “reputation” often weighs in favour of international law compliance. States desire a reputation for principled behaviour, for propriety and respectability.<sup>56</sup> Henkin also noted that compliance with international law is dependent on the attitude of States towards international law. Some States are – according to Henkin – sensitive to stigma of violating international law. Guzman’s explains in his reputational theory that a State’s decision to comply with international law reflects a judgment that the costs of violation outweigh the benefits.<sup>57</sup> According to Guzman, reputation plays a central role in this compliance ‘calculation’, and so do direct sanctions: “along with the possibility of direct sanctions, reputation provides an incentive for States to comply with their obligations.”<sup>58</sup> The greater the costs incurred by loss of reputation or sanctions for violating international law, the greater the propensity of States to comply with international law. Unlike Chayes & Chayes, who argue that sanctions are never required or appropriate to ensure compliance, Downs Rocke & Barsoom argue in their enforcement theory that sanctions are needed.

Senegal likes to be perceived as a country that is respectful in the promotion and protection of human rights and it has a fear to damage this reputation. Respondents explained that Senegal is in general a very proud country. More specifically, it is proud to be an exception in the region with regard to the level of democracy and the absence of a military coup. One of the respondents argued: “We are seen as a good model of African democracy.” Senegal wants to maintain its position and aims to be “ahead” of other countries. It wants to be

<sup>54</sup> United Nations General Assembly, *National Report of Senegal*, Human Rights Council, A/HRC/WG.6/17/SEN/1, 23 July 2013, para. 24.

<sup>55</sup> L. Henkin, *How Nations Behave: Law and Foreign Policy*, New York, Columbia University Press, 2<sup>nd</sup> edition, 1979, p. 52.

<sup>56</sup> *Ibid.*

<sup>57</sup> A.T. Guzman, A Compliance-Based Theory of International Law, *California Law Review*, Volume 90, 2002, p. 1853.

<sup>58</sup> *Ibid.*, p. 1886.

perceived as an example for other African countries and see itself as a “leader” in West Africa. Many respondents explained that Senegal cares a lot about this ‘image’ of the country. One of the respondents argued: “It is just because they are afraid that their counterpart would look down at them.” Reputational concerns are indeed important in relation to the ‘compliance question’ in Senegal.

In the fifth place, several IL and IR theories pointed to *power and coercion* as factors that explain compliance and non-compliance. Realists explain that ‘power and coercion’ rather than ‘the rule of law’, is the answer to the question why States comply with international law.<sup>59</sup> Classical realists argue that international treaties exist only because powerful States benefit from their existence. They regard international law as an instrument for powerful States to achieve their objectives. Thus, international law is complied with only when it is in the interest of dominant and powerful States, which coerce less powerful States into accepting the international legal framework and complying with it.<sup>60</sup> According to realists, the level of compliance with international law will depend on the presence of the hegemon(s) and its use. In other words: States comply with international rules, because “someone else makes them.”<sup>61</sup> This also means that States are not bound by international law, but remain free to violate international law whenever it is in their interest to do so. Koh also use the factor coercion in his transnational legal process theory. He refers to the realist values of power and coercion to explain instances of compliance with international law. He suggested that States never truly comply with international law, but only comply with it when sufficiently coerced.<sup>62</sup>

In general, respondents explained that Senegal feels pressure from the international community to comply with the human rights framework. Respondents argued for example that President Leopold Senghor “wanted to please the West so much that he would accept everything.” Some respondents pointed to economic factors that play a role in treaty ratification and compliance. They argued that compliance with the human rights framework secures aid to Senegal; the distribution of foreign aid among recipient countries is, according to some respondents, an important factor why Senegal complies. A more specific example of the influence is the adoption of Law No. 99-05 criminalizing FGM/C in Senegal just one month before the US State Department’s annual report on human rights was to be released.<sup>63</sup> This report includes a list of African States that have criminalized FGM/C and those that have not. It is used as a guide for Congress and US agencies on how to allocate military and

<sup>59</sup> R.B. Mitchell, *Compliance Theory: A Synthesis*, *Compliance Theory: A Synthesis, Review of European Community & International Environmental Law*, Volume 2, No. 4, 1993, p. 327.

<sup>60</sup> O.A. Hathaway, *Do Human Rights Treaties Make a Difference?*, *Yale Law Journal*, Volume 112, 2002, pp. 1945.

<sup>61</sup> H.H. Koh, *How is International Human Rights Law Enforced?*, *Indiana Law Journal*, Volume 74, 1999, p. 1402.

<sup>62</sup> *Ibid*, p. 1401-1402.

<sup>63</sup> Hecht, D., *When a Law Sweeps in, Tradition Lashes Back*, 4 February 1999, available at [http://www.csmonitor.com/1999/0204/p1s3.html/\(page\)/4](http://www.csmonitor.com/1999/0204/p1s3.html/(page)/4) [Last Accessed 1 October 2015].

financial aid.<sup>64</sup> Critics therefore say that the government, which receives substantial aid from the US, adopted the law “to please American sensitivities.”<sup>65</sup> A significant portion of the population were of the opinion that (foreign) donors and international partners had imposed this law on the Senegalese population.<sup>66</sup> However, this factor could also influence compliance negatively. One of the respondents explained for example, when elaborating on the problem of the extreme delays in the submission of periodic reports, that the Senegalese government “does not want to put effort in writing a report that is going to the West, to prove to them that we are good people.”

In the sixth place, the compliance theory of Henkin also noted that *political personalities* (and their personal power and tenure) are a factor influencing compliance with international law.<sup>67</sup> According to Henkin, a special commitment of a president or politician to a rule or international agreement enhances the likelihood of compliance.

The role and influence of political personalities is indeed a factor that positively influenced the process of compliance. Respondents mentioned President Léopold Sédar Senghor<sup>68</sup> in relation to the human rights framework in general. He was committed to consolidate democracy and the rule of law as well as the respect for the protection of human rights.<sup>69</sup> Respondents described him as very “open-minded” and “encouraging” in this regard. In relation to the practice of FGM/C specifically, respondents explained that President Abdou Diouf<sup>70</sup> played an important role. FGM/C had been a subject long avoided by Senegalese politicians out of fear of losing the support of their constituents, but President Abdou Diouf was a vocal supporter of efforts to stop FGM/C. The respondents characterized him as an advocate for human rights and he was taking the lead to end FGM/C in Senegal. His speech in 1997 during the 33<sup>rd</sup> Congress of the International Federation for Human Rights in Dakar, where he openly took a stand against FGM/C, was frequently mentioned during the interviews as a decisive moment in Senegal. In addition, another person that was mentioned during the interviews was Ndèye Soukèye Gueye, who was for a long time the head of the Department of the Family. Respondents argued that when she was in power, things in relation to FGM/C were moving forward and the human rights framework was being implemented. She was praised for the

<sup>64</sup> Hecht, D., *Senegal: Ban on Female Circumcision Backfires*, InterPress Third World News Agency, 1999, available at <http://www.panix.com/~squigle/dcp/fgmlaw.html> [Last Accessed 1 October 2015].

<sup>65</sup> The Economist, *Female Genital Mutilation: Is it Crime or Culture? Banning the Practice May not be the Best Way of Ending it*, 11 February 1999, available at <http://www.economist.com/node/185966> [Last Accessed 1 October 2015].

<sup>66</sup> AWEPA, *Senegalese Parliamentarians Mobilized Against Female Genital Mutilation: Dr. Omar Ndoye Interview*, 11 October 2013, available at <http://www.awepa.org/news/interview-with-dr-omar-ndoye/> [Last Accessed 1 October 2015].

<sup>67</sup> L. Henkin, *How Nations Behave: Law and Foreign Policy*, New York, Columbia University Press, 2<sup>nd</sup> edition, 1979, p. 64-66.

<sup>68</sup> President Léopold Sédar Senghor was the first President of the Republic of Senegal (1960-1980).

<sup>69</sup> See also C.H. Heyns and F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, Martinus Nijhoff Publishers, 2002, p. 518.

<sup>70</sup> President Abdou Diouf was the second President of the Republic of Senegal (1981-2000).

role she played during her term at the Ministry. However, this factor could also influence compliance negatively. Just after President Abdou Diouf called for a law to criminalize FGM/C in Senegal at his Council of Ministers, he tracked back and claimed that the law was intended to be symbolic in nature.<sup>71</sup>

In the seventh place, several IL theories pointed to *legitimacy and fairness* as a factor that explains compliance and non-compliance. Franck explained in his legitimacy theory that legitimacy is the driving force behind State compliance. The (perceived) fairness of international rules themselves is – according to Franck – the key to compliance. Legitimacy exerts a “pull to compliance” and rules that are not fair exert little “compliance pull.” Koh similarly argued in his transnational legal process theory that rule-legitimacy is a factor that explains compliance. He assumed that States comply with international law, guided by a sense of moral obligation derived from considerations of fairness, democracy and legitimacy.<sup>72</sup> The internalization process aims to “bind that other party to obey the interpretation as part of its internal value set.”<sup>73</sup>

Considerations relating to legitimacy and fairness indeed play a major role in Senegal. Local customs clashed with human rights norms, which was for example clearly observable in relation to the adoption of Law No. 99-05 criminalizing FGM/C in 1999. There was widespread resistance against the enactment of the law. This resistance came in the first place from communities, who had a long-standing history of practicing FGM/C. They felt that their local culture was being threatened. Second of all, resistance against the adoption of the law came from traditional spiritual leaders and – perhaps unexpectedly – also from Civil Society Organizations (CSOs). Practicing communities considered FGM/C as a positive norm and therefore did not accept the law. They could not identify themselves with the “unfair” law. Since there is a lack of public legitimacy (or lack of ‘social internalization’ of the norm, according to the theory of Koh), there is also a lack of compliance. Practicing communities did not (and still do not) report cases to the police. When family members and/or cutters are nevertheless arrested (for example when CSOs tip the police), they are often pardoned before the case can be judged because communities go on strike and demonstrate in front of the courtroom. Most cutters or family members who have been sentenced to jail did not serve the full prison sentence. They were released early, because clashes broke out between practicing communities and local police. Respondents explained that as long people support the practice, a national law criminalizing FGM/C would not stop them. UNFPA explains that at the local level, social norms have usually “more influence over people’s everyday lives than do the actions of the national government. From the point of view of society, power resides at the community level. People pay much more attention to social norms –and to local leaders

<sup>71</sup> B. Shell-Duncan et al., *Legislating Change? Responses to Criminalizing Female Genital Cutting in Senegal*, *Law & Society Review*, Volume 47, No. 4, 2013, p. 817.

<sup>72</sup> H.H. Koh, 1998 *Frankel Lecture: Bringing International Law Home*, Faculty Scholarship Series, Paper 2102, 1998, p. 635.

<sup>73</sup> H.H. Koh, *Why Do Nations Obey International Law?*, *Yale Law Journal*, Volume 106, 1997, p. 2646.

who support them— than to a national law. They identify with social norms much more strongly, even if they know that a law exists.”<sup>74</sup>

In the eighth place, the managerial theory of Chayes & Chayes pointed to the *temporal dimension* of the social, economic, and political changes contemplated by regulatory treaties as a factor that lies at the root of non-compliance with international law. This factor is closely related to the previous factor of legitimacy and fairness. Chayes & Chayes explain that significant changes in social systems with the means of treaties take time and that a period of transition is always necessary. They emphasized that the problem of a ‘time lag’ is more prominent in the field of human rights: “Human rights norms, despite their almost universal acceptance, are slow to establish themselves in places where they may clash with local customs, culture, and systems of government.”<sup>75</sup>

The ‘temporal dimension’ indeed played a role in Senegal. As the previous section showed, there was a lot of resistance against the enactment of the law. The CSO Tostan requested a delay in the implementation of the law, because they were of the opinion that a wide sensitization/education campaign among practicing communities was needed first. The Minister of Justice refused to allow for a delay in the application of the law. As a result, Tostan had to suspend activities, since it increased defensiveness among the communities that practice FGM/C: “Village women did not want to participate in the programs, angry about the law that now made their friends and neighbours criminals.”<sup>76</sup> Many respondents were of the opinion that the law came too early and argued that the country was not ready for the law. A representative of civil society argued: “It was too soon for the population to accept and adopt that law, because they were not really sensitized. And they did not know or understand why the law was adopted. They did not understand why FGM was all of a sudden forbidden.” The adoption of the law came as a surprise for the Senegalese population. The Senegalese government did not consult the communities that practice FGM/C, nor community leaders nor religious leaders, in the process of formally criminalizing the practice. The law came too early and a “period of transition” might have resulted in better compliance. Respondents recommended that it is important to take time before a law is enforced, to make sure that: (i) the process is inclusive; (ii) key players are involved; and (iii) communities are informed and have the time to be sensitized, in order to achieve compliance with the norm.

In the ninth place, several IL and IR theories pointed to the *pressure of influential parties* and/or the *pressure of domestic interest groups* as factors that influences compliance positively and negatively. According to the compliance theory of

<sup>74</sup> United Nations Population Fund and United Nations Children’s Fund, *Senegal: Human Rights Key to Ending FGM/C, Legislation is Just One Aspect of an Effective Campaign*, p. 4, available at [http://www.unfpa.org/gender/docs/fgmc\\_kit/LawSenegal.pdf](http://www.unfpa.org/gender/docs/fgmc_kit/LawSenegal.pdf) [Last Accessed 1 October 2015].

<sup>75</sup> A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements*, Harvard University Press, 1995, p. 16.

<sup>76</sup> M. Antonazzo, Problems with Criminalizing Female Genital Cutting, *Peace Review*, Volume 15, No. 4, 2003, p. 474.



Henkin, this factor is a driving force of non-compliance with international law.<sup>77</sup> Alternatively, liberal theorists argue that compliance with international law is determined in large part by the domestic structure of a country: liberal States tend to comply more with international human rights law commitments than non-liberal States, mainly because domestic interest groups will put pressure on liberal States to comply with their international legal obligations. Similarly, Koh explains in his transnational legal process theory that not just States enforce international human rights law, but “people like us, by people with the courage and commitment to bring international human rights law home through a transnational legal process of interaction, interpretation, and internalization.”<sup>78</sup> The spiral model of Risse, Ropp and Sikkink also includes the important role of domestic opposition groups in mobilizing and effectuating change.<sup>79</sup>

This factor plays a major role in Senegal in relation to the ‘compliance question’. First of all, the pressure and influence by *Marabouts*<sup>80</sup> is an important factor in relation to the ‘compliance question’ in Senegal. The population in Senegal is predominantly Muslim (94%) and *Marabouts* have a major influence in the Senegalese society. The Senegalese population (including amongst others, politicians, judges and police officers) are unwilling or unable to oppose the *Marabouts*. Respondents explained that the *Marabouts* spheres of influence reach to virtually all sectors of life. One respondent explained: “They [Muslims in Senegal] don’t make their own choices, but they believe what *Marabouts* are telling them. They just accept it.” Very often, the position of the *Marabout* is of greater significance than the Senegalese government or national law. *Marabouts* have also a big influence in relation to the practice of FGM/C, since they all are in favour of the practice and defend FGM/C as part of their religion and tradition. When Law No. 99-05 criminalizing FGM/C was debated in Parliament, the supreme *Marabout* of northern Senegal, Thierno Mountaga Tall, pronounced a *fatwa*<sup>81</sup> in which he cited a Prophet’s *Hadith*<sup>82</sup> from which he inferred that FGM/C “is a corollary to circumcision [...] and both operations are intrinsic elements of human nature.”<sup>83</sup> In addition, this supreme *Marabout* distributed a document in the Parliament called *Striking proofs concerning the recommendable practice of excision of young girls*<sup>84</sup> explaining the religious importance of FGM/C. Furthermore, *Marabouts* urged Muslim deputies to vote

<sup>77</sup> L. Henkin, *How Nations Behave: Law and Foreign Policy*, New York, Columbia University Press, 2<sup>nd</sup> edition, 1979, p. 74.

<sup>78</sup> H.H. Koh, How is International Human Rights Law Enforced?, *Indiana Law Journal*, Volume 74, 1999, p. 1417.

<sup>79</sup> T. Risse et al., *The Power of Human Rights: International Norms and Domestic Change*, Cambridge University Press, 1999, p. 22.

<sup>80</sup> A *Marabout* is a Muslim religious leader and teacher in West Africa, often a scholar of the Qur’an and a religious teacher.

<sup>81</sup> A *fatwa* is a religious edict.

<sup>82</sup> *Hadiths* are the collections of the reports claiming to quote what the Prophet Muhammad and other founders of Islam said on any matter.

<sup>83</sup> M. Ndoeye, *Le Processus de Pénalisation de l’Excision au Sénégal: Enjeux et Perspectives pour les Droits Sexuels des Femmes*. Institut de Hautes Etudes et du Développement, Thèse de Doctorat No. 901, Genève, 2011, p. 134.

<sup>84</sup> S. O’Neill, *Defying the Law, Negotiating Change: The Futanke’s Opposition to the National Ban on FGM in Senegal*, Doctoral Thesis, Goldsmiths, University of London, 2012, p. 88, available at <http://research.gold.ac.uk/8852/> [Last Accessed 1 October 2015].

against the bill. Some Parliamentarians were strongly influenced by this pressure and raised questions during the debate about FGM/C and religion. Some deputies explained that they could not vote for the law, because they did not want to criminalize their relatives for respecting tradition and religion.<sup>85</sup>

Not only in relation to the adoption of the law, but also during court cases, *Marabouts* have influenced the outcome of cases. During the trial of one of the (few) court cases, around 200 local *Marabouts* spoke out in defence of the cutter and of FGM/C and declared that the law prohibiting FGM/C should be repealed.<sup>86</sup> The *Marabouts* demanded the liberation of the offenders, which eventually happened after three months imprisonment. Another problematic issue in relation to the influence of the *Marabouts* is the link between the *Marabout* and the belief in superstitious or sub-natural powers. When a judge in the region Matam who sentenced the parents and a cutter to jail – against the will of one of the *Marabouts* who threatened the judge – got a heart attack, many people in Senegal believed that the judge had gone against the laws of ancestors or the will of Allah. They interpreted the heart attack as a sign that the judge took the wrong decision and that he should have listened to the *Marabout*. The consequences of this case in Matam for the enforcement of the law prohibiting FGM/C were enormous, since no prosecutor, no lawyer and no judge dared to burn their fingers on an FGM/C case. In Senegal, the pressure of *Marabouts* hamper compliance with the human rights framework in relation to the practice of FGM/C. However, the pressure of religious leaders could also enhance compliance with the human rights framework in relation to the practice of FGM/C. For example, the *fatwa* issued by the Al-Azhar Supreme Council of Islamic Research in Egypt in 2007 has considerable influence in countries where FGM/C is a common practice. It is one of the first authoritative condemnations of FGM/C in Islam. The *fatwa* explains that FGM/C has no basis in Sharia or any of its partial provisions, and that it is an act that should be avoided. In 2013, the Senegalese Network of Islam and Population (*Réseau Islam & Population*) issued the ‘Islamic Argument for the abandonment of excision in Senegal’ (*Argumentaire Islamique pour l’abandon de l’excision au Sénégal*). This document clearly refers to the *fatwa* issued by the Al-Azhar Supreme Council and provides a response to actors in the field who are confronted with opposition based on religious arguments. Furthermore, the Network of Islam and Population bring together a number of experts and organize workshops and meetings in the field of Islamic religious doctrine, imams, academic researchers and representatives of the major fraternities and *Marabout* families. They are deeply committed to eliminate FGM/C in Senegal.

Second of all, the pressure and influence of civil society is an important

<sup>85</sup> Tostan, *Breakthrough in Senegal: Ending Female Genital Cutting, The Process that Ended Female Genital Cutting in 31 Villages*, Africa Operation Research & Technical Assistance/Project II Population Council, 1999, p. 71, available at [http://www.popcouncil.org/uploads/pdfs/frontiers/OR\\_TA/Africa/PD\\_Sen\\_Tostan\\_orta.pdf](http://www.popcouncil.org/uploads/pdfs/frontiers/OR_TA/Africa/PD_Sen_Tostan_orta.pdf) [Last Accessed 1 October 2015].

<sup>86</sup> United Nations Population Fund and United Nations Children’s Fund, *Senegal: Human Rights Key to Ending FGM/C, Legislation is Just One Aspect of an Effective Campaign*, p. 3, available at [http://www.unfpa.org/gender/docs/fgmc\\_kit/LawSenegal.pdf](http://www.unfpa.org/gender/docs/fgmc_kit/LawSenegal.pdf) [Last Accessed 1 October 2015].

factor in relation to the 'compliance question' in Senegal. Civil society in Senegal is very strong and CSOs have a powerful voice. CSOs in Senegal have put pressure on the government to ratify human rights treaties. Women's groups were very much aware of the existence of international and regional human rights treaties and were engaged to push the government to sign and them. In addition, CSOs have put pressure on the government to comply with the human rights framework. One civil society representative said: "We have some organizations that are really playing their watchdog role about the violation of human rights and they even have ways to reporting at international level." More specifically, activists and CSOs brought not only FGM/C to the attention of the 'general public' in Senegal in the 1990s, but they also pushed for the adoption of the national law criminalizing FGM/C. Respondents explained that these activists were very intelligent, strong, influential Senegalese women who were very committed to women's rights issues. These CSOs, women's associations and intellectuals were convinced that FGM/C should be eliminated. The women's organizations worked closely together and were able to effectively mobilise the Collective of Women Parliamentarians. The female presence in the Senegalese government, as well as women's activism and the fact that FGM/C was practiced among minority groups, made the law against FGM/C pass. Together with UN partners, CSOs actively put effort in developing the policies. The work and experience of CSOs in the field was taken into account, especially when the second NAP was developed. Respondents considered the work of CSOs in the communities crucial in relation to the 'compliance question'. Many respondents (including representatives of the government, civil society and international organizations) explained that CSOs do "most of the work" in the field of FGM/C in Senegal. A civil society representative explained: "In communities, NGOs are doing the implementation, instead of the State." A representative of an international organization explained: "The Ministry of the Family is in the lead to coordinating the NAPs, but it is all the NGOs who work hard." A representative of civil society said: "The work of civil society organizations reflects actually the work of the government, which is trying to eradicate the practice FGM."

Thirdly, the pressure and influence of international organizations is an important factor in relation to the 'compliance question' in Senegal, but this has already been discussed in relation to 'capacity building'.

## 6. COMPLEX PUZZLE OF PUSH- AND PULL FACTORS

From the above it becomes clear that there is no clear-cut answer to the 'compliance question' in relation to the practice of FGM/C in Senegal. A complicated mix of actors interact, work together and clarify why Senegal is partly in compliance and partly not in compliance with the human rights framework in relation to the practice of FGM/C.

After having addressed the factors that explain compliance and non-compliance with the human rights framework in relation to the practice of FGM/C in Senegal, the next (and final) step of this research is to revert to the theoretical framework. Chapter II established a difference between two broad types of theories, namely interest-based (or rationalist) theories and norm-based

(or normative) theories. Both groups of theories provide insights into compliance-related behaviour. Norm-based theories focus more on cooperation, the normative power of rules to shape the conduct of States, the persuasive power of ideas and the influence of shared discourse. States comply because of their commitments and follow the “logic of appropriateness.” Interest-based theories focus more on deterrence and enforcement and regard States as rational, self-interested actors that calculate costs and benefits in an anarchic international system. States choose rationally to comply or not to comply and follow the “logic of (expected) consequences.” Although both types of theories appear at first glance to be mutually exclusive, the analysis in this research has shown that factors that follow from both norm-based theories (such as legitimacy, lack of capacity, time lags) as well as factors that follow from interest-based theories (such as reputational concerns, power and coercion, punishment and sanctions) explain the behaviour of the Senegalese State. There is thus no single theory (or type of theory) that is ‘right’, ‘more prominent’ or that explains for 100% why Senegal complies with or violates the human rights framework in relation to the practice of FGM/C. Norm-based theories are perhaps “too optimistic” and a bit “naive” about the compliance behaviour of States. In turn, interest-based theories are perhaps “too negative” and “too sceptical” about the compliance behaviour of States.<sup>87</sup> Factors from both norm-based theories and interest-based theories provide useful and complementary insights into Senegal’s behaviour. To use the words of Koh: “Each theory or factor gets a piece of the puzzle right, but none alone captures the entire picture.”<sup>88</sup> A mix of all factors, or all pieces together, forms the answer to the ‘compliance question’. Although sometimes there are strong forces pushing Senegal towards compliance (for example the fear of loss of reputation or the or the pressure of civil society), at the same time there are strong forces influencing compliance negatively (lack of national capacity and resources or the lack of deterrence). There is no single factor that has the power to force Senegal to comply with the human rights framework in relation to the practice of FGM/C. Compliance is an ongoing process of push and pull factors that influences the ‘compliance decision’ of Senegal. At the time of this research, some factors were more prominent than others. For example, the lack of national capacity and the influence of the *Marabouts* were more prominent than for example political personalities and concerns about reputation. However, as this research has shown, this was different in the past (President Abdou Diouf was a vocal supporter of efforts to stop FGM/C in the 1990s) and can (rapidly) change in the future, depending on the circumstances.

In addition – perhaps more unexpectedly – there is no clear division between factors that explain compliance on the one hand and factors that explain non-compliance (as the IL and IR theorists often want us to believe) on the other. Instead, as demonstrated in the analysis in section 6, the same factors that contribute towards compliance, often also hamper compliance, and the other way around.

<sup>87</sup> E.A. Posner, *The Twilight of Human Rights Law*, Oxford University Press, 2014, p. 70.

<sup>88</sup> H.H. Koh, 1998 *Frankel Lecture: Bringing International Law Home*, Faculty Scholarship Series, Paper 2102, 1998, p. 635.

## 7. CONCLUDING REMARKS

The ultimate goal of the human rights framework is to generate real change, more specifically to reduce and eventually eliminate the practice of FGM/C worldwide. However, the human rights framework itself does not guarantee automatic compliance behaviour. Becoming a party to a treaty is one step, but recognition of rights on paper is not sufficient. This research showed that a discrepancy exist between the commitments of Senegal to comply with the human rights framework on the one hand and the actual behaviour of Senegal on the other. Despite the efforts of the Senegalese government, which must be acknowledged, the extent of compliance with the human rights framework in relation to FGM/C in Senegal is limited. More than one million girls and women in Senegal are living with the consequences of FGM/C and hundreds of thousands of girls and women in Senegal run the risk of undergoing, and will undergo the practice in the (near) future. A lot of work remains to be done. There is a clear need to intensify, expand and improve efforts in relation to FGM/C in order to achieve greater compliance with the human rights framework.

But does that mean that the commitments of Senegal in relation to the elimination of FGM/C should be regarded as “empty promises”? This research showed that Senegal’s promises are not empty. It is a complicated process to generate the real change that is necessary to modify the *status quo*. It is a rather ambitious task for the Senegalese government to narrow the gap between the aspirations and values embodied in the human rights instruments and documents on the one hand, and the reality that FGM/C persists in Senegal on the other. To a large extent, the level of compliance is dependent on the (un)willingness of the Senegalese government to take action against FGM/C. Political will and political leadership is crucial. At the same time, although to a more limited extent, the (in)ability of Senegal to take action against the practice of FGM/C should also be mentioned. The human rights framework requires States to take costly measures, while , in the words of one of the respondents, has “many other incredible problems on their plate.” The answer to the ‘compliance question’ is not only a matter of (political) willingness, but also a matter of ability.

In the end, the question about compliance is a question about behavioural motivations. The Government of Senegal is ultimately responsible to bring their behaviour into compliance with the human rights framework. Although the State has an obligation to respect and protect the human rights of girls and women, Senegal is not the *only* or *principal* actor in relation to the ‘compliance question’. The influence and importance of other key actors (including CSOs, and international organizations like UNFPA and UNICEF) proved to be very important. They have much influence in relation to realizing compliance with the human rights framework.

Some respondents suggested that key towards eliminating FGM/C in Senegal is “a matter of education.” Not only education in relation to the harmful physical, medical, and psychological effects of the practice of FGM/C,

but to raise the level education in general. The illiteracy rate in Senegal is very high (65%) and the education level of the Senegalese population is low, especially among women.<sup>89</sup> When analyzing the DHS and MICS in Senegal, the statistics show indeed that the prevalence of FGM/C among young girls decreases, when the education level of the mother increases.<sup>90</sup> The DHS-2014 showed that the prevalence among young girls is 14.7% when the mother has no education compared to 6.7% when the mother has at least completed secondary education. Similarly, when the level of education increases, the view that FGM/C should be abandoned is also more common.<sup>91</sup>

The main difficulty with the practice of FGM/C is that cultural change is required. FGM/C remains a persistent and complex practice in Senegal, which is (for all actors, including the government, CSOs and international organizations) hard to change. The elimination of FGM/C has not, and will not be realized overnight,<sup>92</sup> and most probably not in one generation. The reason is that cultural norms, practices and traditions need to change, as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of girls and women in the family and society.<sup>93</sup> However, if the factors that have been identified in this research will be addressed in the (near) future, Senegal will most probably be able to turn their promises into a lasting reality, and generate positive change to girls and women at risk of undergoing the practice of FGM/C.

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<sup>89</sup> Overall, 57% of Senegalese women aged 15-49 have no formal education, compared to 48% of men in the same age-category. By contrast, only 3.1% of the women and 3.2% of men have completed primary education. Only 2% of the Senegalese women reported having completed secondary education or higher, compared to 4.1% of men.

<sup>90</sup> The DHS-2014 showed that the prevalence among young girls is 14.7% when the mother has no education compared to 6.7% when the mother has at least completed secondary education.

<sup>91</sup> More specifically, 18.0% of the women and 16.6% of the men without any education believe that the practice should continue, against 7.8% of the women and 8.1% of the men who completed secondary education or higher.

<sup>92</sup> E. Sepper, *Confronting the "Sacred and Unchangeable": The Obligation to Modify Cultural Patterns under the Women's Discrimination Treaty*, *University of Pennsylvania Journal of International Law*, Volume 30, No. 2, 2008, p. 627.

<sup>93</sup> United Nations Committee on the Elimination of Discrimination Against Women, *Concluding Observations, Senegal*, CEDAW/C/SEN/CO/3-7, 28 July 2015, para. 18.



## SUMMARY





## SUMMARY

This research addresses the practice of Female Genital Mutilation/Cutting (FGM/C), also known as female circumcision. The practice is defined as “all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons.”<sup>1</sup> Over the last decades, discourse in relation to the elimination of FGM/C is positioned within the scope of international and regional human rights law. The practice is considered a form of Violence Against Women (VAW) and a human rights violation. A comprehensive human rights framework exists at both the international and regional levels that addresses VAW and harmful practices in general, and FGM/C in particular. Despite the various international and regional (quasi) legal norms addressing the practice of FGM/C, the prevalence rates have remained high in many of the countries where FGM/C occurs. This raises the question to what extent (and why) States comply, or in the case of FGM/C, appear not to comply, with the human rights framework that is designed to eliminate the practice. Senegal is selected as a case study. The central question of this research was the following: *Which factors explain compliance and/or non-compliance with the human rights framework in relation to the practice of Female Genital Mutilation/Cutting in Senegal?*

This research is structured in four parts, namely (I) theoretical framework; (II) human rights framework; (III) empirical analysis; and (IV) conclusions.

Part I of this research consisted of the theoretical framework (Chapter II). Since the 1950s, legal theorists and political scientists have had extensive debates on the importance of international law and developed theories on the question why States comply with (or violate) international law, with the aim to gain a deeper understanding of the role of international law in shaping state behaviour. Henkin’s famous claim “it is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time”<sup>2</sup> set the stage for new compliance scholarship in the end of the 1970s. Since then, both International Law (IL) and International Relations (IR) scholars have developed a wide variety of theories, in an effort to explain State compliance with international law. In Chapter II, these compliance theories were analyzed by means of a literature review, with the aim to identify

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<sup>1</sup> World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement*, WHO Library, 2008, p. 4.

<sup>2</sup> L. Henkin, *How Nations Behave: Law and Foreign Policy*, New York, Columbia University Press, 2<sup>nd</sup> edition, 1979, p. 47.

the factors that these theories ascribe compliance or non-compliance with international law in general and the human rights framework in particular.

First of all, four IL theories and four IR theories that are generally regarded as the “dominant strands” (or “leading schools”) in IL and IR literature were examined (see table 7.1). IL and IR theories are often based on contradictory premises. In general, traditional IL scholars *believe* or have *faith* that international law matters and have built their theories on an assumption of a general propensity of States to comply with international law. These assumptions are probably rooted in predominant positivism of the traditional IL discipline. IR scholars are far more sceptical and assume the ample opposite. They have pessimistic expectations on the role of international law to change behaviour of States. However, the chasm between the two disciplines has narrowed as IL and IR theorists have begun to share insights in the late 1990s. The research agendas in IL and IR have converged around the ‘compliance question’.

Table 7.1 Dominant strands in compliance theory

International Law (IL)	International Relations (IR)
Henkin’s compliance theory	Realism
Chayes and Chayes’ managerial theory	Institutionalism
Franck’s legitimacy theory	Liberalism
Koh’s transnational legal process theory	Constructivism

Second of all, in this period of new interdisciplinary scholarship, alternative compliance theories have been developed that shed new light on the ‘compliance question’. A new generation of IL and IR scholars have advanced the traditional IL and IR theories and shared distinct perspectives on international law in general and the human rights framework in particular. Seven theories that are in the current IL and IR literature accepted as alternatives to the “dominant strands” were examined in Chapter II as well, including: (i) Guzman’s reputational theory; (ii) Downs, Rocke & Barsoom’s enforcement theory; (iii) Goldsmith & Posner’s limit theory; (iv) Risse, Ropp & Sikkink’s spiral model; (v) Goodman & Jinks’ State socialization theory; (vi) Brunnée & Toope’s interactional theory; and (vii) Moore’s signaling theory.

After careful analysis of all these compliance theories, a distinction was made between two groups of theories: (i) theories based on interest; (ii) and theories based on norms. It was found that these new approaches are largely in consistence with the considerable body of existing work of IL and IR scholars. Recent scholars draw on, and their theory is often a derivative of the traditional IL and IR theories. Several factors have been identified that explain compliance and non-compliance with international (human rights) law, which are listed in table 7.2 below.

**Table 7.2 Factors explaining compliance and non-compliance**

Compliance	Non-Compliance
Self-interest	Self-interest
Legitimacy and fairness	Legitimacy and fairness
Transparent treaty language	Ambiguity in treaty language
Reputation	Lack of national capacity
Power and coercion	Lack of deterrence
Punishment and sanctions	Pressure of influential parties
Political personalities	Inadequate legal advice
<i>Pacta sunt servanda</i>	Outdated treaty norms
Reduce transaction costs	Failing treaty negotiation process
Symbolic validation, ritual and pedigree	Time lag between commitment and compliance
Coherence	Clash with local customs
Communitarianism	Unauthorized act
Internalization of rules	
Pressure of domestic interest groups	
Imitation of others	
Signaling	
Acculturation	
Reciprocity	

Part II of this research consisted of the human rights framework (Chapter III and IV). Chapter III provided more background information on the practice FGM/C. It was essential to explain in depth what the practice of FGM/C exactly entails, in order to be able to link the phenomenon to the different human rights that are being violated and the applicable human rights framework.

Chapter III showed that there are four different types of FGM/C. The most severe type is infibulation, which involves the narrowing of the vaginal opening through the creation of a covering seal. UNICEF estimates that 125 million girls and women have undergone FGM/C, and an estimated 30 million girls are at risk of undergoing FGM/C over the next decade if current trends persist. However, the practice might be much more common than the figures of UNICEF show, because small-scale local research has increasingly collected evidence, showing that FGM/C is practiced in countries in Asia,<sup>3</sup> the Middle

<sup>3</sup> Including Brunei, India, Indonesia, Malaysia, Maldives, Pakistan, Philippines, Singapore, Sri Lanka, Tajikistan and Thailand.

East<sup>4</sup> and Latin America.<sup>5</sup> The practice became also a concern among migrant communities in Europe, the United States, Canada, Australia and New Zealand. The practice occurs at all ages, but FGM/C is mostly carried out on girls between birth and age of 15. According to UNICEF, in half of the countries with available data on FGM/C, the majority of girls underwent FGM/C before their fifth birthday. Occasionally, adult women are also subjected to FGM/C (for example a few days before marriage, after marriage, or after their first pregnancy). The age at which girls and women undergo FGM/C varies substantially from country to country, and even within countries, depending on local traditions and circumstances. Traditional practitioners mostly carry out FGM/C. The practice is often seen as a “women’s business”, because the cutting is done by older women, primarily organized by (grand)mothers and practiced on young girls. The ‘medicalization’ of FGM/C – the practice being performed by doctors or other members of the health profession – is increasing in some countries, although the WHO has consistently condemned it. FGM/C is usually performed in rural areas in the girl’s home, traditionally without (proper) anaesthesia. Non-sterile cutting devices are likely to be used (on several girls at once), including: scissors, razor blades, knives, sharpened rocks or broken glass. The practice of FGM/C does not have any health benefits and can cause serious adverse immediate and long-term effects on the girl’s and women’s physical, sexual and emotional health, since it involves removing and damaging healthy female genital tissue. There is no clear-cut answer to the question why people practice FGM/C, since the reasons and justifications for the practice of FGM/C are numerous, intertwined and related to each other. The most commonly cited for the continuation of the practice are ‘custom’ and ‘tradition’. FGM/C is often deeply rooted in local culture and has been passed from one generation to another. Communities want to preserve their cultural identity and therefore uphold traditions like FGM/C. Another common justification for FGM/C is related to women’s sexuality. It is believed that uncut women will not be able to control their sexuality. FGM/C therefore safeguards a woman’s morality, sexual “purity” and ensures a lack of desire. It prevents a woman from engaging in promiscuity and discourages her from sinful and deviant sexual behaviour. Since in many practicing communities family honour depends on a girl’s virginity or sexual restraint, an uncut girl will bring shame on herself and her family, and she will subsequently find difficulties in getting married. Although FGM/C is practiced across religions, it has required a particular religious dimension. Significant proportions of practicing communities (especially in Asia and the Middle East) believe that FGM/C is a Muslim obligation, although no reference to FGM/C can be found in the Quran. The practice of FGM/C is also justified on the grounds of hygiene and aesthetics. Some practicing communities are of the opinion that the female genitalia are dirty, ugly and unsightly. Uncut women are regarded as unclean. For that reason the female genitalia must be cut to enhance a women’s appearance and to facilitate cleanliness. Local terms used to refer to the practice are often

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<sup>4</sup> Including Bahrain, Iran, Israel, Jordan, Kuwait, Oman, Palestinian Territories, Saudi Arabia, Syria, United Arab Emirates and Qatar.

<sup>5</sup> Including in Colombia.

synonymous with purification or cleanliness. Finally, many myths and false beliefs are associated with the practice of FGM/C. A common explanation for the continuation of FGM/C is social pressure within communities. FGM/C is often referred to as a social norm and the social convention theory offers explanations why this practice is strongly resistant to change. Because of the social structures within the community, it is difficult for individuals to stop the practice of FGMC on their own, without the support from the whole community. Parents love their children and carry out FGM/C in order to ensure the marriageability of their daughters. Elimination of FGM/C requires, according to the social convention theory, a process of social change. After all, FGM/C is a very complex and multifaceted practice.

Chapter IV showed that initially, the UN was reluctant to take action in the field of FGM/C and placed the practice outside the scope of international human rights law. However, this changed in the 1990s with the global movement against Violence Against Women (VAW). The legal analysis conducted in Chapter IV had the aim to describe which rights are being violated and to provide an overview of the obligations and recommendations for States in relation to the elimination of FGM/C. The Chapter showed that FGM/C violates a number of recognized human rights protected by international and regional human rights instruments, including the right to be free from gender-discrimination, the right to the highest attainable standard of health, the right to life (when the procedure results in death), the right to freedom from torture or cruel, inhuman or degrading treatment or punishment and the rights of the child. These human rights are enshrined in various human rights treaties that are legally binding upon States that have ratified them. Among others, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the African Charter on Human and Peoples' Rights (ACHPR), also known as the "Banjul Charter," the Protocol to the ACHPR on the Rights of Women in Africa ("Maputo Protocol") and the African Charter on the Rights and Welfare of the Child (ACRWC) are important. These human rights instruments contain provisions under which FGM/C constitute a violation of human rights, and oblige States parties to take measures to prevent and eliminate the practice. In addition to these hard law instruments, the practice of FGM/C has been specifically addressed in many soft law instruments, including in Declarations, Programmes and Plans of Action, General Recommendations (GR) and General Comments (GC) of Treaty Monitoring Bodies, and non-binding resolutions. Chapter IV also illustrated that conflicts between human rights can arise when supporters of FGM/C invoke the right to culture, minority rights and the right to religious freedom. However, these three human rights are not absolute and the human rights framework allows for limitations of these rights. States have a due diligence obligation to prevent, protect, investigate, prosecute and punish those responsible, including private individuals for human rights violations. Although private individuals practice FGM/C (rather than State officials), States are still responsible for these private acts, if they fail to act with due diligence to prevent, investigate and, in accordance with national legislation, punish acts of VAW in general and FGM/C in particular. States have a duty to take action in order to eliminate FGM/C.

Part III of this research consisted of the empirical analysis (Chapter V). Although the human rights framework has been developed at the international level, the work on eliminating FGM/C must be done at the national level. A case study has been conducted at the national level in Senegal evaluating the extent of compliance with the human rights framework in relation to the practice of FGM/C. Senegal signed and ratified all the human rights treaties that are important in relation to the practice of FGM/C and has not made any reservations to these treaties. At first glance, the extent of compliance might seem rather promising: the Senegalese Constitution establishes the enjoyment of rights without discrimination, an impressive institutional framework has been established consisting of many National Human Rights Institutions (NHRIs) that are involved in the promotion and protection of human rights, a national law criminalizing FGM/C is adopted in 1999, National Action Plans (NAPs) and many other policies have been adopted aimed at preventing and eliminating FGM/C, and CSOs are actively involved as regards to awareness raising at the community level. However, further analysis showed that Senegal is only to a limited extent in compliance with the human rights framework that is designed to eliminate the practice of FGM/C.

First of all, Senegal is under the obligation to submit periodic reports to the respective Treaty Monitoring Bodies (TMBs) on how the rights are being implemented, but the country is not fully in compliance with this obligation. Problematic are the considerable amount of outstanding and overdue reports. However, when periodic reports were submitted to the TMBs, Senegal was in compliance with the recommendation to include in their reports information about the legislation in force against FGM/C, measures taken to eliminate FGM/C, statistics on the incidence of FGM/C in the country and the progress made in this respect.

Senegal is in compliance with the obligation to embody the principle of equality of men and women in the national constitution. The Senegalese Constitution establishes the enjoyment of rights without discrimination. However, there are major vacuums and gaps in the national laws when the Constitution is applied. Some national laws in Senegal remain deeply discriminatory against women, in particular in matters relating to the family.

Senegal is in compliance with the obligation to prohibit FGM/C. In 1999, the National Assembly passed law No. 99-05 modifying the Penal Code. Art. 299bis of the Penal Code criminalizes all forms of FGM/C, including the medicalization of the practice. The penalty is six months to five years imprisonment. The maximum penalty will be applied if FGM/C is “carried out or promoted by a person in the medical or paramedical field.” However, Senegal is not in compliance with the recommendation to ensure the effective enforcement and implementation of this law, since FGM/C is still practiced in Senegal with impunity. The amount of court cases is not representative for the incidence of FGM/C in Senegal, because people refuse to report FGM/C cases to the police. Only a handful of individuals have been prosecuted for FGM/C since the adoption of the law. Senegal did not establish a national mechanism for the implementation and monitoring of legislation and law enforcement, nor were ‘adequate resources’ made available for the implementation of legislative frameworks aimed at eliminating FGM/C.

Senegal is in compliance with the recommendation to develop appropriate measures, including National Action Plans (NAPs), strategies, policies, rules and regulations aimed at preventing and eliminating FGM/C. The Senegalese government developed two NAPs, a medical policy and a religious policy in 2013. Although these policies (especially the NAPs) have much potential in relation to coordination of actions in the field of FGM/C in Senegal, they are not well implemented. Senegal is not in compliance in relation to the implementation of the national legislative frameworks on FGM/C. Adequate accountability mechanisms at the national and local levels to monitor adherence to and implementation of these policy documents are not in place. No resources were allocated to the implementation of policies and programmes by the Senegalese government: the UNFPA-UNICEF Joint Programme allocated financial resources to the implementation of the NAPs instead.

Senegal is partly in compliance with the recommendation to collect and disseminate basic data about prevalence, trends, attitudes and behaviour regarding FGM/C. The Demographic and Health Surveys (DHS) and Multiple Indicator Cluster Surveys (MICS) collected data in Senegal on the prevalence of FGM/C, the types of FGM/C practiced, the girl's age at the time of the procedure, the type of practitioner who performed the practice and the beliefs and opinions about FGM/C. Senegal also collected data on the cases and enforcement of legislation with a study of Professor Ndiaye to get a more accurate picture of the status of implementation of Law No. 99-05 of 29 January 1999. However, FGM/C remains poorly documented in Senegal and expressed the need for further research and data collection on FGM/C in Senegal.

Senegal is not in compliance with the obligation to provide necessary support to victims of FGM/C, nor with the obligation to protect women who are at risk of being subjected to FGM/C. There are no adequate social and/or psychological support services specifically designed for girls and women who have been subjected to FGM/C and those at risk. There is a serious lack of support services for (potential) victims of FGM/C.

Senegal is not in compliance with the obligation to create public awareness in all sectors of society regarding FGM/C through information, formal and information education, and outreach programmes. Awareness about FGM/C at the community level is raised by Civil Society Organisations (CSOs) and efforts of International Organizations (IOs), not by the Senegalese government. Respondents were critical on the role of the government in this regard. Representatives of civil society referred often – quite frustrated – to meetings or workshops organized by the government to talk about FGM/C “in wonderful hotels in Dakar or Saly” while they could not see how this would directly help the communities on the ground. In addition, according to the respondents, the government does not recognize the role that CSOs play in the movement to eliminate FGM/C, nor does the government give CSOs all necessary (financial) support and encouragement. Many respondents (including representatives of the government, international organizations, and civil society) explained that awareness of FGM/C is not integrated in the curricula of (medical, legal, social work) students. There are no training programmes for health professionals (doctors, nurses, midwives, psychologists) to detect, manage and counsel FGM/C. Non-formal and informal educational activities and trainings on FGM/C are sporadically provided in the relevant sectors. The government does



not promote gender-sensitive, empowering educational processes. If initiatives are taken in this regard, the initiative is taken by UN agencies or CSOs.

Senegal is partly in compliance with the recommendation to engage a wide range of stakeholders. Many actors are involved in the action taken against FGM/C. However, this is not because the government engages these stakeholders, but it is mostly because of the work of the UNFPA-UNICEF Joint Programme and CSOs themselves. CSOs try to involve community leaders, religious leaders, men and boys in their advocacy and awareness-raising campaigns.

Senegal complied with the recommendation to explore alternatives to FGM/C and to support and provide alternative training and education possibilities for cutters, in order to convert them to an alternative profession. In cooperation with the Ministry of Women, Family and Children, a Senegalese CSO started a pilot project. However, this 'alternative source of income approach' proved to be an unsuccessful strategy in Senegal. Therefore, training programmes or alternative livelihoods for local practitioners of FGM/C are not (any more) provided in Senegal.

Thus, there are major gaps between the *de jure* and *de facto* compliance in Senegal. Despite the efforts of the Senegalese government, which must be acknowledged, the extent of compliance with the human rights framework in relation to FGM/C in Senegal is limited and a lot of work remains to be done. Enacting laws and adopting policies is the beginning, but not the end. There is a clear need to intensify, expand and improve efforts in relation to FGM/C in order to achieve greater compliance with the human rights framework. Although there is probably not a single country in the world that has a perfect human rights record, nor is in full compliance with the human rights framework in relation to FGM/C, the level of compliance in Senegal proved to be (disappointingly) limited.

Part IV of this research consisted of the conclusions (Chapter VI). In this Chapter, an answer to the central research question was formulated. The concluding chapter showed that, although Senegal has often been referred to as a "promising practice" in relation to the elimination of FGM/C, because it was the first country in which a series of public declarations of FGM/C abandonment were made, careful analysis of the DHS and MICS regarding Senegal shows that the national prevalence of FGM/C is not declining as rapidly as the UNFPA-UNICEF Joint Programme, the Senegalese government and Civil Society Organizations (CSOs) might have hoped for. The national prevalence of FGM/C among girls and women of reproductive age (15 to 49 years) remained fairly constant in the past decade. Between 2005 and 2014 the national prevalence of FGM/C declined in Senegal with 3.5% (from 28.2% in 2005 to 24.7% in 2014).

Chapter VI showed that there is no clear-cut answer to the 'compliance question' in relation to the practice of FGM/C in Senegal. A complicated mix of factors interact, work together and clarify why Senegal is partly in compliance and partly not in compliance with the human rights framework in relation to the practice of FGM/C. These factors include: (i) lack of national capacity and resources, (ii) lack of deterrence and the fear for punishment and sanctions, (iii) reputation; (iv) power and coercion; (v) political personalities; (vi) legitimacy

and fairness; (vii) temporal dimension; (viii) pressure of influential parties and/or the pressure of domestic interest groups.

First of all, there is a lack of human, financial and material resources at the Department of the Family (*Direction de la Famille*) of the Ministry of Women, Family and Children (*Ministre de la Femme, de la Famille et de l'Enfance*), which is the coordinating body of the Senegalese government to take action in the field of FGM/C. The weak capacity of the Department of the Family and the lack of ownership, coordination and cooperation at the national level (with other Ministries, but also with other actors in the field) contributes to non-compliance with the human rights framework. Not only at the Ministerial level this lack of capacity proved to be a problem, but also in relation to the National Human Rights Institutions (NHRIs) at the national level. The Senegalese authorities have established an impressive institutional framework consisting of many NHRIs that are involved in the promotion and protection of human rights, but there is no clear division of tasks or coordination between these institutions. In the second place, there is a lack of deterrence, since the UN and AU monitoring mechanisms are, to a large extent, powerless to punish Senegal when the State is not in compliance with the human rights framework. In the third place, reputational concerns are important in relation to the 'compliance question'. Senegal fears to damage its reputation, since it is a country that is proud to be an exception in the region with regard to the level of democracy and the absence of a military coup. In the fourth place, pressure from the international community (or 'powerful States') enhances compliance with the human rights framework in Senegal. The fifth factor that influences compliance is the role of political personalities. President Léopold Sédar Senghor, President Abdou Diouf and Ndèye Soukèye Gueye were mentioned as influential persons that either influenced the process of compliance positively and/or negatively. In the sixth place, considerations relating to legitimacy and fairness indeed play a major role in Senegal. Local customs clashed with human rights norms, which was for example clearly observable in relation to the adoption of Law No. 99-05 criminalizing FGM/C in 1999. In the seventh place, the temporal dimension of the social, economic, and political changes contemplated by regulatory treaties as a factor that lies at the root of non-compliance with the human rights framework in Senegal. A "period of transition" might have resulted in better compliance. In the eighth place, influential parties and/or domestic interest groups influence compliance positively and negatively in Senegal. First of all, the pressure and influence by *Marabouts*<sup>6</sup> is an important factor. Very often, the position of the *Marabout* is of greater significance than the Senegalese government or national law. *Marabouts* have also a big influence in relation to the practice of FGM/C, since they all are in favour of the practice and defend FGM/C as part of their religion and tradition. When Law No. 99-05 criminalizing FGM/C was debated in Parliament, the supreme *Marabout* of northern Senegal, Thierno Mountaga Tall, pronounced a *fatwa*<sup>7</sup> in which he

<sup>6</sup> A *Marabout* is a Muslim religious leader and teacher in West Africa, often a scholar of the Qur'an and a religious teacher.

<sup>7</sup> A *fatwa* is a religious edict.

cited a Prophet's *Hadith*<sup>8</sup> from which he inferred that FGM/C "is a corollary to circumcision [...] and both operations are intrinsic elements of human nature."<sup>9</sup> Furthermore, *Marabouts* urged Muslim deputies to vote against the bill. Not only in relation to the adoption of the law, but also during court cases, *Marabouts* have influenced the outcome of cases. Second of all, the pressure and influence of civil society is an important factor in relation to the 'compliance question' in Senegal. Civil society in Senegal is very strong and CSOs have a powerful voice. CSOs in Senegal have put pressure on the government to ratify human rights treaties. More specifically, activists and CSOs brought not only FGM/C to the attention of the 'general public' in Senegal in the 1990s, but they also pushed for the adoption of the national law criminalizing FGM/C. CSOs have an important role to play in relation to the compliance question, since they actually do "most of the work" in the field of FGM/C in Senegal. A civil society representative explained: "In communities, NGOs are doing the implementation, instead of the State." Finally, although mentioned very often by several scholars as a factor that hampers compliance, ambiguity of treaty language does not influence compliance negatively in Senegal, since the Senegalese government knows exactly what is expected from them in relation to the elimination of FGM/C. Although the treaty language in the provisions of the CEDAW and CRC are general, arguably a bit vague and imposes broad obligations upon States, it was for the Senegalese State clear what the object and of the legally binding treaty obligations (and non-binding recommendations following from soft-law instruments) contain.

The propensity of Senegal to join international and regional human rights framework does not automatically mean that it will bring its human rights practice into compliance with the human rights framework. Becoming a party to a treaty is one step, but recognition of rights on paper is not sufficient to guarantee that these rights will be enjoyed in practice. This research showed that a discrepancy exist between the commitments of Senegal to comply with the human rights framework on the one hand and the actual behaviour of Senegal in relation to the practice of FGM/C on the other. Today, more than one million girls and women in Senegal are living with the consequences of FGM/C and hundreds of thousands of girls and women in Senegal run the risk of undergoing, and will undergo the practice in the (near) future. But does that mean that the commitments of Senegal in relation to the elimination of FGM/C should be regarded as "empty promises"? This research showed that Senegal's promises are not empty. It is a complicated process to generate the real change that is necessary to modify the *status quo*. It is a rather ambitious task for the Senegalese government, civil society and international organizations to eliminate the persistent practice of FGM/C in Senegal. The elimination of

<sup>8</sup> *Hadith* are the collections of the reports claiming to quote what the Prophet Muhammad and other founders of Islam said on any matter.

<sup>9</sup> M. Ndoye, *Le Processus de Pénalisation de l'Excision au Sénégal: Enjeux et Perspectives pour les Droits Sexuels des Femmes*. Institut de Hautes Etudes et du Développement, Thèse de Doctorat No. 901, Genève, 2011, p. 134.

FGM/C has not, and will not be realized overnight,<sup>10</sup> and most probably not in one generation. The reason is that cultural norms, practices and traditions need to change, as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of girls and women in the family and society.<sup>11</sup> However, if the factors that have been identified in this research will be addressed in the (near) future, Senegal will most probably be able to turn their promises into a lasting reality, and generate positive change to girls and women at risk of undergoing the practice of FGM/C.

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<sup>10</sup> E. Sepper, Confronting the “Sacred and Unchangeable”: The Obligation to Modify Cultural Patterns under the Women’s Discrimination Treaty, *University of Pennsylvania Journal of International Law*, Volume 30, No. 2, 2008, p. 627.

<sup>11</sup> United Nations Committee on the Elimination of Discrimination Against Women, *Concluding Observations, Senegal*, CEDAW/C/SEN/CO/3-7, 28 July 2015, para. 18.



## RÉSUMÉ

La présente recherche traite de la pratique des Mutilations Génitales Féminines / de l'Excision (MGF/E) que l'on appelle aussi circoncision féminine. On définit cette pratique comme «toutes les interventions consistant à enlever totalement ou partiellement les organes génitaux externes de la femme ou à leur causer d'autres lésions pour des raisons non thérapeutiques.»<sup>1</sup> Au cours des dernières décennies, le débat sur l'élimination des MGF/E s'est inscrit dans le cadre des instruments internationaux et régionaux relatifs aux droits de la personne. Cette pratique est en effet considérée comme une forme de violence faite aux femmes et une violation de leurs droits fondamentaux. Un cadre général des droits de l'homme, en vigueur sur le plan international et régional, aborde la question des violences faites aux femmes et des pratiques culturelles néfastes en général et des MGF/E en particulier. Mais en dépit de ce cadre et des différentes normes quasi-juridiques portant sur l'excision, les taux de prévalence de cette pratique demeurent élevés dans de nombreux pays. Dès lors, se pose la question de savoir dans quelle mesure (et pour quelles raisons) les États se conforment, ou dans le cas des MGF/E, ne se conforment apparemment pas à ce cadre des droits de l'homme, dont l'objet est d'éliminer cette pratique. Le Sénégal est sélectionné comme une étude de cas. La problématique centrale de la présente recherche repose donc sur la question suivante: *Quels sont les facteurs qui expliquent pourquoi le Sénégal se conforme et/ou ne se conforme pas au cadre des droits de l'homme pour éliminer la pratique des mutilations génitales féminines / de l'excision dans ce pays?*

Cette étude comprend quatre parties, à savoir I) le cadre théorique; II) le cadre des droits de l'homme; (III) l'analyse empirique; et (IV) la conclusion.

Première partie, cadre théorique (Chapitre II): Depuis les années 1950, les spécialistes du droit et des sciences politiques ont eu de longs débats sur l'importance du droit international et ont élaboré des théories sur la question de savoir pourquoi les États se conforment aux normes du droit international (ou les violent), l'objectif étant de mieux comprendre le rôle du droit international dans le façonnement du comportement des États. L'observation célèbre de Louis Henkin selon laquelle «presque toutes les nations observent presque tous les principes du droit international et presque toutes leurs obligations presque

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<sup>1</sup> Organisation mondiale de la santé, éliminer les mutilations génitales féminines : déclaration inter-institutionnelle, Bibliothèque de l'OMS, 2008, p.4.

tout le temps<sup>2</sup> » a ouvert la voie à de nouvelles conceptions de la question de la conformité au droit à la fin des années 1970. Depuis, les spécialistes du droit international et les experts en relations internationales ont élaboré de multiples théories pour tenter d'expliquer la façon dont les États respectent la légalité internationale. Le chapitre II fait le point de ces théories à travers une analyse documentaire qui vise à cerner les facteurs qui expliquent pourquoi les pays appliquent ou non le droit international, en général, et le cadre relatif aux droits de l'homme, en particulier.

Le chapitre examine tout d'abord quatre théories de spécialistes du droit international et quatre théories d'experts en relations internationales, considérées en général comme les « courants principaux » (ou grandes écoles) de pensée dans la documentation concernant l'application ou le respect des normes en matière des droits de l'homme (voir tableau 7.1). Les théories élaborées de part et d'autre reposent souvent sur des prémisses contradictoires. En général, les théoriciens traditionnels du droit international qui croient en la primauté de ce droit, ont construit leurs théories sur l'hypothèse d'une propension générale des États à se conformer au droit international. Ces hypothèses sont probablement enracinées dans le positivisme dominant de la discipline traditionnelle du droit international. Les spécialistes en relations internationales sont, pour leur part, beaucoup plus sceptiques et pensent largement le contraire à ce sujet. Ces derniers se montrent très pessimistes quant à la possibilité que le droit international puisse jouer un rôle dans le changement du comportement des États. Le fossé entre ces points de vue s'est toutefois réduit lorsque les théoriciens des deux bords ont commencé à converger sur la « question de la conformité au droit » à la fin des années 1990, en faveur de leurs programmes de recherche.

Tableau 7.1 Principaux courants théoriques de la conformité au droit international

Droit International	Relations internationales
Théorie du respect des droits ( <i>Compliance theory</i> ) de Henkin	Réalisme
Théorie de la gestion juridique ( <i>Managerial theory</i> ) de Chayes & Chayes	Institutionnalisme
Théorie de la légitimité ( <i>Legitimacy theory</i> ) de Franck	Libéralisme
Théorie du processus juridique transnational ( <i>Transnational legal process theory</i> ) de Koh	Constructivisme

Ce chapitre s'intéresse ensuite aux autres théories, qui ont été élaborées dans le contexte des nouvelles recherches interdisciplinaires et qui ont apporté un éclairage différent sur « la question de la conformité au droit ». Une nouvelle

<sup>2</sup> L. Henkin, *How Nations Behave (Comment les Nations se comportent): Law and Foreign Policy*, New York, Columbia University Press, 2ème édition, 1979, p. 47.

génération de spécialistes du droit international et des relations internationales a développé des théories qui se rejoignent sur les concepts traditionnels mais qui expriment des visions divergentes sur la question du respect par les États du droit international en général et du cadre relatif aux droits de l'homme en particulier. Le chapitre II expose donc également sept théories contenues dans les manuels traitant du droit international et des relations internationales, et qui sont acceptées comme alternatives aux «principaux courants» théoriques susmentionnés. Ces sept théories sont: i) la théorie de la réputation de Guzman; ii) la théorie de l'application (*enforcement theory*) de Downs, Rocke & Barsoom; iii) la théorie des limites (du droit international) de Goldsmith & Posner; iv) la théorie du modèle en spirale de Risse, Ropp & Sikkink; (v) la théorie de la socialisation des États de Goodman & Jinks; (vi) la théorie interactionnelle de Brunnée & Toope; et vii) la théorie du signal de Moore.

Après une analyse minutieuse de toutes ces approches en matière de conformité, la présente recherche établit, dans sa première partie, une distinction entre les deux groupes de théories: i) celles fondées sur les intérêts; et ii) celles fondées sur les normes. Elle constate que ces nouvelles approches vont largement dans le même sens que les nombreux travaux réalisés par les spécialistes du droit international et des relations internationales. Elles découlent souvent des théories traditionnelles en matière de droit international et de relations internationales. De nombreux facteurs expliquant le respect ou le non-respect par les États des normes du droit international relatives aux droits de l'homme sont exposés dans le tableau 7.2 ci-après:

Tableau 7.2 Facteurs expliquant le respect et le non-respect du droit international relatif aux droits de l'homme

Respect	Non-respect
Intérêt personnel	Intérêt personnel
Légitimité et équité	Légitimité et équité
Transparence dans la formulation des instruments juridiques	Ambiguïté dans la formulation des instruments juridiques
Réputation	Manque de capacités au niveau national
Pouvoir et coercition	Absence d'effet dissuasif
Punitions et sanctions	Pression des parties influentes
Personnalités politiques	Conseils juridiques inappropriés
<i>Pacta sunt servanda</i> (Les conventions doivent être respectées)	Dispositions obsolètes des normes des instruments juridiques
Coûts de transaction réduits	Echec du processus de négociation des instruments
Validation symbolique, rites, ascendance	Décalage entre engagement et respect
Cohérence	Contradiction avec les coutumes locales
Communautarisme	Loi non autorisée
Internalisation des règles	
Pression des groupes d'intérêt locaux	



Communication

Acculturation

Réciprocité

La deuxième partie de la présente recherche porte sur le cadre relatif aux droits de l'homme (chapitres III et IV). Le chapitre III fournit davantage d'informations de base sur la pratique des MGF/E, compte tenu de la nécessité d'expliquer de manière approfondie ce qu'est cette pratique et ce qu'elle implique concrètement sur le plan des violations des différents droits de l'homme et du cadre juridique applicable en la matière.

Le chapitre III définit quatre différentes formes de MGF/E. La forme la plus sévère est l'infibulation qui consiste en une excision et en l'ablation des grandes lèvres et en le scellement des deux bords, au moyen de points de suture ou en permettant une soudure naturelle des tissus de la cicatrice. Selon l'UNICEF, 125 millions de femmes et de filles ont déjà fait l'objet de la pratique de la MGF/E, et 30 millions de filles risquent de la subir au cours de la prochaine décennie si les tendances actuelles persistent. Cette pratique pourrait même être beaucoup plus répandue que ne l'indiquent les chiffres de l'UNICEF si l'on se réfère aux données recueillies par le biais d'études effectuées à petite échelle, qui tendent à montrer que la MGF/E se pratique aussi bien dans les pays d'Asie<sup>3</sup>, que dans ceux du Moyen-Orient<sup>4</sup> et de l'Amérique latine<sup>5</sup>. Cette pratique suscite également des préoccupations au sein des communautés immigrées en Europe, aux États-Unis, au Canada, en Australie et en Nouvelle-Zélande. La MGF/E a lieu à tout âge mais plus généralement sur des filles entre leur naissance et l'âge de 15 ans. Selon l'UNICEF, dans la moitié des pays où les données sur les MGF/E sont disponibles, les fillettes subissent en majorité l'excision avant leur cinquième anniversaire. Parfois, ce sont des femmes adultes qui sont soumises à cette pratique (juste avant ou après leur mariage, ou suivant leur première grossesse). L'âge auquel les filles et les femmes font l'objet de la MGF/E varie considérablement d'un pays à l'autre, et même au sein d'un même pays, en fonction des traditions et des particularités locales. Les MGF/E sont généralement pratiquées par des « sage-femmes traditionnelles ». Cette pratique est souvent considérée comme une « affaire de femmes » car elle est organisée essentiellement par les grand-mères et pratiquée sur les fillettes par des femmes âgées. La « médicalisation » des MGF/E où se sont les médecins ou autres membres du corps de la santé qui interviennent pour pratiquer l'ablation est de plus en plus fréquente dans certains pays en dépit du fait que l'OMS a toujours condamné la pratique. Traditionnellement, les excisions sont faites en zone rurale dans les maisons des filles, sans recours à une anesthésie correcte et en utilisant des instruments tranchants non-stériles (sur plusieurs filles à la fois), notamment des ciseaux, des lames de rasoir, des couteaux, des pierres aiguisées ou du verre brisé. La pratique de la MGF/E n'entraîne aucun bienfait sur la

<sup>3</sup> Notamment Brunei, Inde, Indonésie, Malaisie, Maldives, Pakistan, Philippines, Singapore, Sri Lanka, Tadjikistan et Thaïlande.

<sup>4</sup> Notamment Bahreïn, Iran, Israël, Jordanie, Kuwait, Oman, Territoires palestiniens, Arabie saoudite, Syrie, Émirats arabes unis et Qatar

<sup>5</sup> Notamment en Colombie

santé et peut au contraire avoir des conséquences graves, immédiates et à long terme, sur la santé physique, sexuelle et émotionnelle des filles et des femmes qui la subissent, car elle implique l'ablation de tissus génitaux normaux et sains. Il n'y a pas de réponse directe et simple à la question de savoir pourquoi les gens pratiquent les MGF/E, car les raisons et les justifications de cette pratique sont nombreuses, interdépendantes et imbriquées les unes aux autres. Les « coutumes » et les « traditions » sont les raisons les plus fréquemment citées pour expliquer la poursuite de cette pratique, qui est souvent profondément ancrée dans la culture locale et transmise d'une génération à l'autre. Les communautés veulent préserver leur identité culturelle et donc respecter les traditions comme l'excision. L'autre justification communément invoquée de la MGF/E est liée à la sexualité féminine. On croit que les femmes non excisées ne seraient pas en mesure de maîtriser leur sexualité. La MGF/E protégerait donc la moralité et la « pureté » sexuelle de la femme en ôtant ou en réduisant le désir sexuel de celle-ci. Elle empêcherait la femme de s'engager dans des relations sexuelles ou de se livrer à des comportements sexuels déviant et condamnables. Dans de nombreuses communautés, l'honneur de la famille dépend de la virginité et de la retenue sexuelle de la fille, une fille non excisée jetterait donc le déshonneur sur elle et sa famille et aurait ensuite des difficultés à se marier. Bien que la MGF/E se pratique dans toutes les religions, on lui attribue une dimension religieuse particulière. D'importantes communautés (en particulier en Asie et au Moyen-Orient) croient que l'excision est une obligation musulmane, même si aucune référence à cette pratique ne se trouve dans le Coran. La pratique est motivée également par des raisons d'hygiène et d'esthétique. Certaines communautés pratiquant la MGF/E considèrent les organes génitaux féminins comme sales et laids et les femmes non excisées comme impures. Elles estiment pour cette raison que les organes génitaux féminins doivent faire l'objet d'une ablation pour améliorer l'apparence et la propreté des femmes. Les termes utilisés sur le plan local en référence à cette pratique sont d'ailleurs souvent synonyme de purification ou de propreté. Enfin, de nombreux mythes ou de fausses croyances sont associés à la pratique des MGF/E. L'autre explication communément donnée pour la poursuite de l'excision est la pression de la communauté. Selon la théorie de la convention sociale, l'excision fait souvent référence à une norme sociale si profondément enracinée et puissante qu'on ne peut la changer. La pression sociale au sein de la communauté est telle qu'il est difficile aux individus d'éliminer la pratique de la MGF/E de leur propre chef, sans l'appui de l'ensemble des structures de cette communauté. Selon la théorie de la convention sociale, les parents aiment leurs enfants et pratiquent l'excision pour permettre à leurs filles de se marier. L'élimination de la MGF/E doit donc passer par un processus de transformation sociale car il s'agit d'une pratique très complexe et à multiples facettes.

Le chapitre IV indique qu'initialement l'Organisation des Nations Unies était réticente à prendre des mesures concernant la question des MGF/E, qu'elle plaçait hors du champ d'application du droit international des droits de l'homme. Cette situation a toutefois changé au cours des années 1990 avec le mouvement mondial visant à mettre fin à la violence faite aux femmes. Le chapitre IV propose une analyse juridique des droits faisant l'objet de violation et donne un aperçu des obligations et des recommandations que les États

doivent respecter en vue de l'élimination des MGF/E. Le chapitre montre que les mutilations génitales féminines ou excisions constituent une violation d'un certain nombre de droits humains reconnus et protégés en vertu des instruments internationaux et régionaux relatifs aux droits de l'homme, notamment le droit d'être à l'abri de toute discrimination fondée sur le sexe, le droit de jouir du meilleur état de santé susceptible d'être atteint, le droit à la vie (lorsque l'intervention entraîne la mort), le droit de ne pas être soumis à la torture et autres peines ou traitements cruels, inhumains ou dégradants et les droits de l'enfant. Ces droits sont inscrits dans divers traités des droits de l'homme qui sont juridiquement contraignants pour les États qui les ont ratifiés. Parmi les instruments importants, on peut citer, entre autres, la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes (CEDAW), la Convention relative aux droits de l'enfant (CDE), la Charte africaine des droits de l'homme et des peuples (CADHP), qu'on appelle également « Charte de Banjul », le Protocole à la CADHP relatif aux droits des femmes en Afrique (Protocole de Maputo) et la Charte africaine des droits et du bien-être de l'enfant (CADBE). Ces instruments relatifs aux droits de l'homme contiennent des dispositions en vertu desquelles les MGF/E constituent une violation des droits de l'homme, et font obligation aux États parties de prendre des mesures visant à prévenir et à éliminer ces pratiques. Outre ces instruments juridiques contraignants, de nombreux instruments à caractère non obligatoire abordent expressément la pratique des MGF/E. Il s'agit notamment de déclarations, de programmes et de plans d'action, de recommandations générales et d'observations générales, d'organismes de surveillance de l'application des traités, et de résolutions non contraignantes. Le chapitre IV montre également que des désaccords en matière de droits peuvent surgir lorsque les partisans des MGF/E invoquent le droit à la culture, les droits des minorités et le droit à la liberté religieuse. Ces trois droits de la personne ne sont toutefois pas absolus car ils peuvent être restreints par le cadre universel relatif aux droits de l'homme. Les États ont une obligation d'agir avec diligence de sorte à prévenir, empêcher, instruire, poursuivre et réprimer les violations des droits de la personne, même lorsque les responsables de telles violations sont des particuliers. Lorsqu'ils pratiquent des MGF/E, ces derniers (plutôt que des représentants de l'État), sont d'autant responsables car les États peuvent être également responsables d'actes privés s'ils n'agissent pas avec la diligence voulue pour prévenir, instruire, et selon les lois nationales, réprimer les actes de violence à l'égard des femmes en général et les MGF/E en particulier. Les États sont tenus à prendre des mesures afin d'éliminer les MGF/E.

La troisième partie (chapitre V) de cette recherche consiste en une analyse empirique. Le cadre des droits de l'homme a été mis au point au niveau international mais les efforts visant à éliminer les MGF/E doivent se réaliser au niveau national. L'étude d'un cas a été menée au Sénégal pour évaluer la mesure dans laquelle ce pays se conforme au cadre universel des droits de l'homme en relation avec la pratique des MGF/E. Le Sénégal a signé et ratifié l'ensemble des traités relatifs aux droits de l'homme qui revêtent de l'importance par rapport à la pratique des MGF/E et n'a formulé aucune réserve vis-à-vis de ces instruments. A priori, la mesure dans laquelle le Sénégal se conforme au cadre des droits de l'homme semble satisfaisante: le pays

dispose d'une constitution qui prévoit la jouissance des droits sans discrimination, d'un dispositif institutionnel impressionnant, qui comprend plusieurs institutions nationales des droits de l'homme (INDH) œuvrant en faveur de la promotion et de la protection des droits de l'homme, une loi nationale criminalisant les MGF/E adoptée en 1999, des plans d'action nationaux (PAN) et de nombreuses autres politiques qui ont été adoptées pour prévenir et éliminer les MGF/E, ainsi que des Organisations de la société civile (OSC) participant activement à la sensibilisation des populations au niveau communautaire. Une analyse plus approfondie montre toutefois que le Sénégal ne se conforme que partiellement au cadre des droits de la personne qui vise à éliminer la pratique des MGF/E.

Tout d'abord, le Sénégal est tenu à présenter aux différents organes chargés de surveiller l'application des traités relatifs aux droits de l'homme des rapports périodiques sur la façon dont il met en œuvre ces droits. Hors, le Sénégal n'a pas pleinement respecté cette obligation. Le retard pris dans la présentation d'un nombre considérable de rapports attendus pose en effet problème. Les quelques rapports que le Sénégal a soumis aux organes de surveillance montrent toutefois que ce pays s'est conformé à la recommandation d'inclure dans ces rapports des informations sur la loi et les mesures prises pour éliminer les MGF/E, les statistiques sur l'incidence de la pratique dans le pays et les progrès réalisés à cet égard.

Le Sénégal consacre le principe de l'égalité des hommes et des femmes dans sa constitution nationale en instaurant la jouissance des droits sans discrimination. Les lois nationales chargées d'appliquer cette disposition présentent toutefois de nombreux vides juridiques et de nombreuses lacunes. Certaines lois nationales au Sénégal restent profondément discriminatoires à l'égard des femmes, particulièrement en ce qui concerne les questions relatives à la famille.

S'agissant de l'obligation d'interdire les MGF/E l'Assemblée nationale sénégalaise a adopté en 1999 la loi n° 99-05 modifiant l'article 299bis du Code pénal, qui réprime toutes les formes de MGF/E, y compris la médicalisation de la pratique. La peine prévue est de six mois à cinq ans d'emprisonnement. La peine maximale doit être appliquée lorsque la MGF/E est "effectuée ou encouragée par un membre du corps médical ou paramédical." Le Sénégal ne s'est pas conformé à la recommandation de veiller à l'application et à la mise en œuvre effective de cette loi, étant donné que les MGF/E sont toujours pratiquées au Sénégal en toute impunité. Le nombre d'affaires traitées en justice n'est pas représentatif de l'incidence des mutilations génitales féminines ou excisions au Sénégal car les personnes refusent de signaler les cas relevant de cette pratique à la police. Seulement quelques individus ont été poursuivis pour ce type d'affaires depuis l'adoption de la loi. Le Sénégal n'a pas mis en place un mécanisme national de mise en œuvre et de suivi de la loi visant à éliminer les MGF/E et ne dispose pas de «ressources suffisantes» pour appliquer les cadres législatifs en la matière.

Le Sénégal s'est conformé à la recommandation concernant la mise en place de mesures appropriées, en particulier de plans d'action nationaux, de stratégies, de politiques, de règles et de règlements visant à prévenir et à éliminer les MGF/E. Le gouvernement sénégalais a élaboré, en 2013, deux plans d'action nationaux pour les secteurs de la santé et des affaires religieuses. Ces

plans d'action et d'autres politiques offrent beaucoup de possibilités en matière de coordination des actions dans le domaine des MGF/E au Sénégal mais ils ne sont malheureusement pas appliqués correctement. Le Sénégal n'a pas respecté son obligation de mettre en œuvre les cadres législatifs sur les MGF/E et ne dispose donc pas de mécanismes de responsabilisation efficace, aux niveaux national et local, pour suivre le respect et la mise en œuvre de ces textes juridiques stratégiques. Le gouvernement sénégalais n'a prévu aucun financement pour soutenir la mise en œuvre des politiques et des programmes. C'est dans le cadre du programme conjoint UNICEF-UNFPA qu'est d'ailleurs financée la mise en œuvre des plans d'action nationaux.

Le Sénégal s'est conformé partiellement à la recommandation sur la collecte et la diffusion des données de base relatives à la prévalence de la pratique des MGF/E, ainsi qu'aux tendances et aux comportements concernant cette question. Lors d'enquêtes démographiques de santé (EDS ou DHS) et d'enquêtes en grappes à indicateurs multiples (EGIM ou MICS), menées au Sénégal, des données ont été recueillies sur la prévalence et les types des MGF/E, l'âge des jeunes filles ou fillettes ayant subi cette pratique, les individus l'ayant pratiquée, ainsi que sur les croyances et les opinions relatives à l'excision. Des données ont été également recueillies sur l'application de la législation nationale sur cette question, notamment grâce à une étude réalisée par le Professeur Ndiaye, qui donne une image plus précise de l'état d'application de la loi n° 99-05 du 29 janvier 1999, qui interdit et réprime la pratique des mutilations génitales féminines. Ces données sont toutefois insuffisantes, ce qui a conduit les spécialistes à insister sur la nécessité de renforcer la recherche et la collecte de données sur la pratique de l'excision au Sénégal, qui reste mal documentée.

Le Sénégal ne s'est pas conformé à son obligation d'apporter le soutien nécessaire aux victimes des MGF/E, ni à son obligation de protéger les femmes qui risquent de subir cette pratique. Il n'existe aucun service de soutien social et/ou psychologique approprié pour les fillettes ou les femmes qui ont été victimes ou qui risquent d'être victimes des MGF/E.

Le Sénégal ne s'est pas non plus conformé à son obligation de sensibiliser tous les secteurs de la société et à mobiliser l'opinion publique contre les MGF/E par le biais de l'information, de l'éducation formelle et informelle et de programmes de sensibilisation. Les campagnes de sensibilisation sur les MGF/E au niveau communautaire sont entreprises par les organisations de la société civile (OSC) et les organisations internationales (OI), et beaucoup moins par le gouvernement sénégalais. Les personnes interrogées dans le cadre de cette recherche se sont exprimées de façon négative sur le rôle joué à cet égard par le gouvernement sénégalais. Les représentants de la société civile ont souvent exprimé leur grande déception du fait que les réunions ou ateliers sur les MGF/E étaient organisés par le gouvernement "dans de magnifiques hôtels à Dakar ou à Saly», ne voyant pas comment cela pourrait aider directement les communautés sur place. En outre, selon les personnes interrogées, le gouvernement ne tient pas compte des efforts que déploient les OSC dans la lutte contre les MGF/E, et ne leur apporte ni soutien financier, ni encouragement. De nombreuses personnes (dont des représentants du gouvernement, d'organisations internationales et de la société civile) ont expliqué que la sensibilisation à la pratique des MGF/E n'était pas intégrée aux

programmes d'études supérieures (médicales, juridiques, sociales). Il n'existe, par ailleurs, aucun programme de formation en faveur des professionnels de santé (médecins, infirmières, sages-femmes, psychologues) pour leur permettre de dépister les MGF/E de les gérer et de prodiguer des conseils aux victimes de cette pratique. Les actions éducatives et de formation, formelles ou informelles, sur les GMF/E, ne sont pas régulières. Le gouvernement n'encourage pas un enseignement qui tient compte de la dimension genre pour apprendre aux filles à maîtriser leur destinée. Les quelques initiatives entreprises dans ce domaine, sont fait par des agences des Nations Unies ou d'OSC.

Le Sénégal s'est conformé en partie à la recommandation de faire participer le plus grand nombre d'acteurs dans la lutte contre les MGF/E. Mais là encore, la participation de ces acteurs ne vient pas du gouvernement mais c'est le résultat d'efforts déployés dans le cadre du Programme conjoint UNFPA-UNICEF et des OSC elles-mêmes. Les OSC tentent d'associer les dirigeants communautaires, les chefs religieux, les hommes ainsi que les garçons dans leurs campagnes de plaidoyer et de sensibilisation.

Le Sénégal a essayé de se conformer à la recommandation de rechercher des alternatives à la pratique de l'excision en offrant un soutien et des possibilités d'éducation et de formation aux exciseuses afin de les convertir à une autre profession. Une OSC sénégalaise a ainsi lancé un projet pilote en coopération avec le ministère des affaires de la Femme, de la Famille et de l'Enfance. Cette approche d'une « source alternative de revenus » aux exciseuses s'est toutefois avérée infructueuse au Sénégal. Les programmes de formation et de création de moyens de subsistance alternatifs en faveur des personnes se livrant à la pratique des MGF/E ne sont donc plus fournis dans ce pays.

Ainsi, il existe des écarts importants entre le respect en droit et le respect en fait des normes juridiques du droit international au Sénégal. Le gouvernement sénégalais a, reconnaissons-le, déployé des efforts pour se conformer au cadre des droits de la personne, relatif à la pratique des mutilations génitales féminines ou de l'excision au Sénégal mais son degré de conformité demeure faible et beaucoup reste à faire dans ce domaine. Promulguer des lois et adopter des politiques n'est pas une fin mais un début. Il est clair que le Sénégal doit accélérer et multiplier ses efforts en vue de mettre en œuvre les instruments juridiques internationaux pour mettre fin aux MGF/E. Aucun pays au monde ne peut se targuer d'un bilan parfait en matière de droits de l'homme, ou de se conformer pleinement au cadre des droits de l'homme relatif à l'excision, mais il faut reconnaître que le degré de conformité du Sénégal s'avère (très) limité.

La quatrième partie (chapitre VI) porte sur les conclusions de la recherche. Elle formule une réponse à la question centrale de la conformité aux normes du droit international, qui indique qu'en dépit de ce que l'on a appelé les « pratiques exemplaires » du Sénégal, ayant été le premier pays à faire une série de déclarations publiques en faveur de l'abandon de la pratique de l'excision une analyse détaillée des EDS et des EGIM montre que la prévalence des MGF/E dans ce pays n'a pas diminué aussi rapidement qu'auraient pu espérer le programme conjoint UNFPA-UNICEF, le gouvernement sénégalais et les organisations de la société civile. La prévalence nationale des MGF/E chez les fillettes et les femmes en âge de procréer (de 15 à 49 ans) est restée assez

constante au cours de la dernière décennie. Elle n'a diminué que de 3,5% entre 2005 et 2014 (de 28,2% en 2005 à 24,7% en 2014).

Le chapitre VI indique qu'il n'y a pas de réponse claire à la «question de la conformité au droit» par rapport à la pratique de l'excision au Sénégal. Un certain nombre de facteurs agissent les uns sur les autres et se conjuguent dans un ensemble complexe pour expliquer pourquoi le Sénégal ne se conforme que partiellement ou pas du tout au cadre des droits de l'homme, relatif à la pratique des MGF/E. Ces facteurs comprennent notamment: i) le manque de capacités et de ressources nationales, ii) l'absence d'effet de dissuasion et le mépris des peines et des sanctions encourues, iii) la réputation; iv) l'intimidation et la coercition; v) les personnalités politiques; vi) la légitimité et l'équité; vii) la dimension temporelle; viii) les pressions exercées par des parties influentes et / ou des groupes d'intérêts nationaux.

Le premier facteur réside dans le manque de ressources humaines, financières et matérielles dont souffre la Direction chargée de la Famille du Ministère de la Femme, de la Famille et de l'Enfance. Cette Direction est l'organe de coordination du gouvernement sénégalais dans les mesures prises en ce qui concerne la pratique des MGF/E. La faiblesse des moyens de la Direction chargée de la Famille, son manque d'appropriation des programmes et l'absence de coordination et de coopération (avec d'autres ministères, mais aussi avec d'autres acteurs concernés) contribuent au non-respect des normes juridiques du cadre des droits de l'homme, relatives à l'excision. Ce manque de capacités ne se pose pas qu'au niveau ministériel. Il touche également les institutions nationales des droits de l'homme (INDH). Les autorités sénégalaises ont mis en place un imposant cadre institutionnel formé de nombreuses INDH qui œuvrent à la promotion et à la protection des droits de l'homme, mais sans répartition clairement établie des tâches et sans coordination parmi elles. Le deuxième facteur repose sur l'absence d'effet dissuasif compte tenu du fait que les mécanismes de surveillance de l'ONU et de l'UA sont, dans une large mesure, impuissants à sanctionner le Sénégal lorsque cet État ne se conforme pas aux dispositions du cadre des droits de l'homme. Le troisième facteur important qui influe sur la «question de la conformité» concerne les préoccupations à l'égard de la réputation du Sénégal. Ce pays craint de porter atteinte à son image de marque car il s'agit d'un pays fier d'être une exception dans la région en ce qui concerne le niveau de démocratie et l'absence de coup d'Etat militaire. Le quatrième facteur réside dans les pressions qu'exercent la communauté internationale (ou les «États puissants») sur le Sénégal pour l'amener à mieux respecter le cadre des droits de l'homme. Le rôle des personnalités politiques constitue le cinquième facteur qui influe sur la question de la conformité. Les Présidents Léopold Sédar Senghor, Abdou Diouf et Ndèye Soukèye Gueye comptent parmi les personnalités dont on dit qu'ils ont influencé le processus de conformité de façon positive ou négative. Les questions de légitimité et d'équité qui jouent un rôle véritablement majeur au Sénégal constituent le sixième facteur. Les coutumes locales se sont souvent heurtées aux normes juridiques des droits de l'homme, ce qui a été clairement mis en évidence lors de l'adoption de la loi n ° 99-05 criminalisant les MGF/E en 1999. Le septième facteur à l'origine de la non-conformité au cadre des droits de l'homme, relatif à l'excision au Sénégal réside dans la dimension temporelle des changements socioéconomiques et politiques prévus par les traités

normatifs. Une "période de transition" aurait donné lieu à une meilleure application du cadre. Le huitième facteur réside dans les pressions qu'exercent certaines parties et/ou groupes d'intérêt nationaux influents sur le gouvernement sénégalais pour l'amener à se conformer ou non au cadre des droits de l'homme relatif à l'excision. Les pressions et l'influence exercées à cet égard par les marabouts<sup>6</sup> est un aspect important. Très souvent, la parole du Marabout a plus d'importance que la position du gouvernement ou que la législation nationale. Les Marabouts ont aussi une grande influence sur la pratique des MGF/E, qu'ils soutiennent et défendent pour des motifs religieux ou traditionnels. Lorsque la loi n° 99-05 criminalisant l'excision a été débattue au Parlement, le Grand Marabout du Nord Sénégal, Thierno Mountaga Tall, avait prononcé une fatwa<sup>7</sup> dans laquelle il avait cité un Hadith<sup>8</sup> du prophète qui lui avait permis de présumer que l'excision était "un corollaire de la circoncision [...] et que les deux pratiques étaient des éléments intrinsèques de la nature humaine."<sup>9</sup> En outre, les marabouts avaient exhorté les députés musulmans à voter contre le projet de loi. Les Marabouts ont joué un rôle influent non seulement lors de l'adoption de la loi, mais également dans l'examen des affaires pénales dont ils ont influencé l'issue. Les pressions et l'influence exercées par la société civile constituent, par ailleurs, un aspect important dans la «question de la conformité au droit» au Sénégal. La société civile sénégalaise est très puissante et ses organisations font entendre leur voix. Les OSC au Sénégal ont fait pression auprès du gouvernement pour qu'il ratifie les traités relatifs aux droits de l'homme. Plus concrètement, les militant(e)s et les OSC au Sénégal ont non seulement porté la question des MGF/E à l'attention du grand public dans les années 1990, mais sont également parvenus à faire adopter la loi nationale criminalisant la pratique de l'excision. Les OSC ont un rôle important à jouer dans la question de la conformité au droit, car ce sont elles qui font réellement "la plus grande partie du travail" en ce qui concerne les MGF/E au Sénégal. Selon un représentant de la société civile : «ce sont les ONG qui mettent en œuvre les programmes à la place de l'Etat au sein des communautés.» Enfin, même si de nombreux chercheurs l'ont mentionné comme étant un facteur qui entrave la non-application des traités et conventions, l'ambiguïté ou le manque de clarté des dispositions de ces traités et conventions ne devrait pas avoir d'impact négatif au Sénégal car le gouvernement sénégalais sait exactement ce qui est attendu de lui en vue de l'élimination des MGF/E. Si les dispositions de la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes (CEDAW) et de la Convention relative aux droits de l'enfant (CDE) sont de nature générale et sans doute un peu vague et imposent des obligations générales aux États, leur objet,

<sup>6</sup> Un *Marabout* est un dignitaire musulman vénéré, qui enseigne le Coran en Afrique de l'Ouest.

<sup>7</sup> Une *fatwa* est un avis juridique donné par un spécialiste de loi islamique sur une question particulière

<sup>8</sup> Un *Hadith* est un recueil qui comprend l'ensemble des traditions relatives aux actes et aux paroles de Mahomet et de ses compagnons, considérées comme des principes de gouvernance personnelle et collective pour les musulmans.

<sup>9</sup> M. Ndoye, *Le Processus de Pénalisation de l'Excision au Sénégal: Enjeux et Perspectives pour les Droits Sexuels des Femmes*. Institut de Hautes Etudes et du Développement, Thèse de Doctorat No. 901, Genève, 2011, p. 134.



ainsi que les obligations découlant des traités juridiquement contraignants (et des recommandations issues des instruments juridiques non contraignants) ne peuvent échapper au Sénégal.

La propension du Sénégal à adhérer aux instruments internationaux et régionaux relatifs aux droits de l'homme ne signifie pas automatiquement que ce pays mettra sa législation et sa pratique des droits de l'homme en conformité avec ces instruments. Devenir partie à un traité constitue une étape mais la reconnaissance des droits sur papier ne suffit pas à garantir que ces droits seront respectés en pratique. La présente étude montre qu'il existe un écart entre les engagements du Sénégal à se conformer au cadre des droits de l'homme et le comportement réel de ce pays par rapport à la pratique de la MGF/E. Aujourd'hui, plus d'un million de filles et de femmes au Sénégal vivent avec les conséquences de l'excision et des centaines de milliers d'autres courent le risque de subir cette pratique dans un proche avenir. Mais devons-nous dire pour autant que les engagements pris par le Sénégal en vue de l'élimination des MGF/E représentent de « vaines promesses »? La présente recherche montre que ce ne sont pas de vaines promesses mais qu'il s'agit d'un processus compliqué visant à susciter un changement réel pour sortir du *statu quo*. Mettre fin à la pratique persistante de l'excision au Sénégal est une tâche assez ambitieuse pour le gouvernement sénégalais, la société civile et les organisations internationales. L'élimination de cette pratique ne peut pas se faire du jour au lendemain<sup>10</sup>, et probablement pas en une génération. Il faut d'abord un changement dans les normes et les pratiques culturelles, les traditions, ainsi que dans les attitudes patriarcales et les stéréotypes profondément ancrés au niveau des rôles, des responsabilités et de l'identité des filles et des femmes au sein de la famille et de la société<sup>11</sup>. Toutefois, si les facteurs évoqués dans cette recherche sont pris en considération à l'avenir, le Sénégal sera probablement en mesure de faire en sorte que ses promesses deviennent une réalité durable, susceptible d'insuffler un changement positif pour les filles et les femmes qui risquent de subir la pratique des MGF/E.

<sup>10</sup> E. Sepper, Confronting the "Sacred and Unchangeable": The Obligation to Modify Cultural Patterns under the Women's Discrimination Treaty, *University of Pennsylvania Journal of International Law*, Volume 30, No. 2, 2008, p. 627.

<sup>11</sup> Comité des Nations Unies pour l'élimination de la discrimination à l'égard des femmes, *observations finales sur la situation des femmes au Sénégal*, CEDAW/C/SEN/CO/3-7, 28 juillet 2015, para. 18.

## ANNEXES



## ANNEX I

### MAP OF SENEGAL<sup>1</sup>



<sup>1</sup> Source: S. Ndiaye and M. Ayad, *Enquête Démographique et de Santé au Sénégal 2005*, Centre de Recherche pour le Développement Humain [Sénégal] et ORC Macro, 2006.



## ANNEX II

### LIST OF PERSONS INTERVIEWED

#### Government

- |                      |   |
|----------------------|---|
| 1. Coumba Ngom Thiam | Ministry of the Family  |
| 2. Soukeye Ndeye     | Ministry of the Family  |
| 3. Astou Diouf       | Ministry of the Family  |
| 4. Mamadou Ndoeye    | Ministry of the Family  |
| 5. Abdoulaye Ba      | Ministry of Justice   |
| 6. Seyni Konte Diop  | Ministry of Health  |
| 7. Yacine Fall Ndeye | Ministry of Education   |
| 8. Aminata Diallo    | Parliamentarian (Réseau Parlementaire pour la protection de l'enfant) |
| 9. Omar Ndoeye       | Association of European Parliamentarians with Africa (AWEPA)          |
| 10. Famara Sane      | Former Parliamentarian  |
| 11. Abdoulaye Mar    | Senegalese Human Rights Committee                                     |
| 12. Marieme Diop     | Consultative Council of Human Rights                                  |

#### International Organizations

- |                                |          |
|--------------------------------|----------|
| 13. Mamadou Wane               | UNICEF   |
| 14. Daniela Luciani            | UNICEF   |
| 15. Jean Lieby                 | UNICEF   |
| 16. Marie Sabara               | UNICEF   |
| 17. Nafissatou J. Diop         | UNFPA    |
| 18. Gallo Kebe                 | UNFPA    |
| 19. Michele Noussoessi Aguey   | OHCHR    |
| 20. Andrea Ori                 | OHCHR    |
| 21. Aminata Kebe               | OHCHR    |
| 22. Marie Piere Chaupin Mangou | UN Women |
| 23. Fatim Tall Thiam           | WHO      |
| 24. Abdrahmane Diallo          | USAID    |

#### Civil Society Organizations

- |                    |                                 |
|--------------------|---------------------------------|
| 25. Molly Melching | TOSTAN                          |
| 26. Kalidou Sy     | TOSTAN                          |
| 27. Oumou Diop     | TOSTAN                          |
| 28. Aminata Diop   | Gesellschaft für Internationale |

	Zusammenarbeit
29. Anta Fall	Save the Children
30. Marietou Dia	Action Aid International
31. Astou Sylla	African Women's Development and Communication Network (FEMNET)
32. Abdoulaye Ka	Le Groupe pour l'Étude et l'Enseignement de la Population (GEEP)
33. Mariame Coulibaly	Women in Law and Development in Africa (WiLDAF)
34. Magatte Sy Gaye	Comité Sénégalais sur les Pratiques Traditionnelles (COSEPRAT)
35. Gabiel Sagna	Comité Sénégalais sur les Pratiques Traditionnelles (COSEPRAT)
36. Moussa Mane	Association Sénégalaise pour le Bien-Etre Familial (ASBEF)
37. Alioune Badara Diouf	Association Sénégalaise pour le Bien-Etre Familial (ASBEF)
38. Yacine Diagne	Association des Femmes de la Médina
39. Fatou Ndiaye Turpin	Réseau Siggil Jigéen
40. Daouda Fall	La Palabre
41. Birame Djiguene Ndoeye	La Palabre
42. Fatou Deme Diouf	Comité de Lutte Contre les Violences faites aux Femmes et aux Enfants
43. Fatou Biutou Thioune	Comité de Lutte Contre les Violences faites aux Femmes et aux Enfants
44. Mahamed Diadhiou	Formation et de Recherche en Santé de la Reproduction (CEFOREP)
45. Birahim Ndiaye	Professor Université Cheikh Anta Diop
46. Fatou Kiné Camara	Professor Université Cheikh Anta Diop
47. Khady Sarr Ndiaye	Association des Juristes Sénégalais (AJS)
48. Soukeyna Ndao Diallo	Association des Juristes Sénégalais (AJS)
49. Ousmane Samb	Réseau Islam et Population (RIP)
50. Abdoul Aziz Kebe	Professor Université Cheikh Anta Diop
51. Abdoul Aziz Kasse	Association Prévenir
52. Jeane Diaw	Enda Graf Sahel
53. Misha Hussain	Journalist Thomson Reuters Foundation
54. Sanou Ndeng Toure	Social worker

## ANNEX III

### INTERVIEW GUIDE

#### Introduction. Professional/Personal Details

1. What is your position?
2. What are your main tasks and duties?

#### Theme I. Ratification of Human Rights Treaties

3. Has the Senegalese government ratified all human rights treaties, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the African Charter on Human and Peoples' Rights (ACHPR)?
  - a. If so, why?
  - b. If not, why not?

#### Theme II. Cooperation with Treaty Monitoring Bodies

4. Does the Senegalese government respect its legal obligation to submit periodic reports to the respective treaty monitoring bodies on how the human rights are being implemented?
  - a. If so, why?
  - b. If not, why not?

#### Theme III. Criminalizing Female Genital Mutilation/Cutting (FGM/C)

5. Why has the law against FGM/C been adopted in 1999?
6. Had the international (UN) and regional (AU) human rights framework any influence on the adoption of the law?
  - a. If so, in what way?
  - b. If not, why not?
7. Does the general population in Senegal have knowledge about the existence of the law criminalizing FGM/C?
  - a. If so, why?
  - b. If not, why not?
8. Has the national law against FGM/C a deterrent effect?
  - a. If so, in what way?
  - b. If not, why not?
9. Is it important to have a national law against FGM/C?



- a. If so, why?
  - b. If not, why not?
10. Is the law against FGM/C sufficiently implemented and enforced?
  - a. If so, in what way?
  - b. If not, should the law be better implemented and enforced?
    - a. If so, how?
    - b. If not, why not?
11. Are mechanisms in place to monitor adherence and implementation of the law?
  - a. If so, in what way?
  - b. If not, why not?
12. Is the number of court cases representative for the incidence of FGM/C in Senegal?
  - a. If yes, why?
  - b. If not, why not?
13. Do you think that it is necessary to increase the number of court cases?
  - a. If not, why not?
  - b. If so, what is needed to increase the number of court cases?

#### **Theme IV. Policies and National Action Plans**

14. Which national policies have been adopted in the field of FGM/C?
15. Why have these policies been adopted?
16. Had the international (UN) and regional (AU) human rights framework any influence on the adoption of these policies?
  - a. If so, in what way?
  - b. If not, why not?
17. What are the reasons for more emphasis on the human rights-based approach in the second National Action Plan?
18. Are the policies well implemented?
  - a. If so, in what way?
  - b. If not, why not?
19. Are there sufficient resources allocated towards the implementation of the policies?
  - a. If so, in what way?
  - b. If not, why not?
20. Have all policies been successful?
  - a. If so, how, on what topics?
  - b. If not, why not? What could be improved?

#### **Theme V. Role of the Government**

21. What is the role of the government in the abandonment of FGM/C in Senegal?
22. Is FGM/C a priority for the Senegalese government?
  - a. If so, in what way?
  - b. If not, why not?
23. Are sufficient resources (including budgets) allocated towards the implementation of the legislative and policy frameworks?

- a. If so, in what way?
  - b. If not, why not?
- 24. Are there any outreach activities to communities by government agencies?
  - a. If so, what kind of activities?
  - b. If not, why not?

#### **Theme VI. Role of Civil Society Organizations (CSOs)**

- 25. What is the role of CSOs in the abandonment of FGM/C in Senegal?
- 26. How does the role of CSOs working in the field of FGM/C relate to the work of the government?
- 27. Does the government recognize the role the CSOs play in the abandonment of FGM/C and give the CSOs all necessary support and encouragement?
  - a. If so, how (f.e. financially)?
  - b. If not, why not?

#### **Theme VII. Role of UNICEF-UNFPA Joint Programme**

- 28. What is the role of the UNICEF-UNFPA Joint Programme in the abandonment of FGM/C in Senegal?

#### **Theme VIII. Data collection and Research**

- 29. Is basic data collected and disseminated about the prevalence, trends, attitudes and behaviour regarding FGM/C in Senegal, as well as reported cases and enforcement of legislation?
  - a. If so, in what way?
  - b. If not, why not?
- 30. Is there a need for more research on FGM/C?
  - a. If so, on which topics?
  - b. If not, why not?

#### **Theme IX. Support Services**

- 31. Are medical, social and psychological support services available to assist and protect girls who have been subjected to FGM/C or those at risk of undergoing FGM/C?
  - a. If so, which support services?
  - b. If not, why not?

#### **Theme X. Training for Students and Professionals**

- 32. Is awareness of FGM/C integrated in the curricula of students?
  - a. If so, why?
  - b. If not, why not?
- 33. Are health professionals (doctors, nurses, midwives, psychologists) trained to detect, manage and counsel FGM/C?
  - a. If so, why?

- b. If not, why not?
- 34. Are trainings on FGM/C provided for the following other sectors: family services and child protection services, teachers and other school staff, legal professionals (judges, magistrates, lawyers), immigration officers and law enforcement professionals?
  - a. If so, why?
  - b. If not, why not?

#### **Theme XI. Training Programmes for Cutters**

- 35. Are training programmes for the cutters provided, in order for them to adopt an alternative profession?
  - a. If so, why?
  - b. If not, why not?

#### **Conclusion. Impact Human Rights Framework**

- 36. Do human rights have an impact on the abandonment of FGM/C in Senegal? Is it important that the international (UN) and regional (AU) human rights framework exist?
  - a. If so, why?
  - b. If not, why not?

## ANNEX IV

### LETTER OF CONSENT

Université de Tilburg  
Institut international de Victimologie  
de Tilburg (INTERVICT)  
PO Box 90153  
5000 LE Tilburg  
Pays-Bas



#### Formulaire d'information et d'autorisation des entretiens avec les parties concernés

##### 1. Contexte et justification

Vous avez été invité(e) à participer à une étude sur «L'application effective ou non du système international des droits de l'homme en ce qui concerne l'éradication de la Mutilations Génitales Féminines/de l'Excision (MGF/E) au Sénégal». Le but de cette étude est d'identifier les facteurs qui influent positivement et / ou négativement sur la conformité du système international des droits de l'homme par rapport aux MGF/E. Cette étude vise à contribuer à une meilleure compréhension de l'approche fondée sur les droits humains en ce qui concerne les MGF/E et la conformité de cette approche avec le système international des droits de l'homme. Notre recherche sera effectuée dans un pays: le Sénégal. Celle-ci se fera sous la direction du Professeur R.M. Letschert de l'Université de Tilburg, aux Pays-Bas en collaboration avec Madame M.J. (Annemarie) Middelburg LLM (PhD/doctorat et chercheur à INTERVICT). Cette dernière aura la charge de mener les entrevues au Sénégal.

##### 2. Procédures

Avant que vous ne décidiez si vous souhaitez participer à cette étude ou non, nous voudrions vous fournir des informations supplémentaires concernant cette étude, les risques potentiels liés à votre participation et sur ce qu'on attend de vous lors d'une éventuelle participation. Si vous jugez être suffisamment informé(e) sur le but, le contenu de l'étude ; si vous décidez d'y participer, nous vous demanderons préalablement de signer le formulaire de consentement ou d'y apposer une petite croix (X) en présence d'un témoin (uniquement si vous êtes analphabète).

Si vous acceptez de participer à cette étude, nous vous inviterons à l'entretien dans un endroit discret. L'entretien prendra à peu près une heure. Il sera enregistré et transcrit par la suite. A part vous-même, seul le chercheur et éventuellement un traducteur/interprète seront présents lors de l'entretien.

Vous avez été invité(e) à l'entrevue en vertu de votre expérience. Vous pouvez refuser de répondre à certaines questions et vous pouvez vous retirer à chaque moment sans donner une justification préalable. La décision d'abandonner l'étude n'aura aucune influence sur la suite de vos relations avec le chercheur ou avec l'instance locale qui vous a contacté(e).

### 3. Confidentialité

Vos données et vos réponses resteront confidentielles. Tous les enregistrements et toutes les transcriptions seront gardés en lieu sécurisé et fermé à l'intérieur d'un bâtiment de l'Université de Tilburg. Les seules personnes ayant accès à cette information sont les chercheurs impliqués dans cette étude. Les informations récoltées pendant l'étude seront rendues anonymes afin d'éviter toute possibilité d'identification. Vous avez le droit d'accéder à vos données aussi longtemps qu'elles n'aient pas été rendues anonymes. Pour cet effet vous pouvez contacter Annemarie Middelburg, la chercheuse principale de cette étude, qui s'occupera du traitement des données.

### 4. Risques

Nous ne prévoyons aucun risque lié à votre participation. Toutefois, il peut arriver que vous divulguiez des informations strictement personnelles où que vous vous sentiez mal à l'aise à cause de la nature de certaines questions posées. Nous voulons éviter ce genre de situations. Vous avez le droit de ne pas répondre ou de passer sous silence certaines questions sensibles durant l'entretien. Vous pouvez également interrompre l'entretien à tout instant. Si vous estimez avoir besoin de soutien concernant certains thèmes traités lors de l'entretien, nous pourrions vous conseiller ou peut être même vous assister.

### 5. Bénéfices

Certes, cette étude n'a aucun bénéfice direct pour vous, mais votre participation nous aidera à en apprendre davantage sur l'impact du cadre international des droits de l'homme. Les données recueillies pourront permettre de mieux comprendre en quoi les droits peuvent changer une pratique culturelle, ce qui peut conduire à des politiques et interventions plus efficaces.

### 6. Compensation

Votre participation à cette étude n'engendre aucun frais supplémentaire.

### 7. Le droit de refuser ou de vous retirer de l'étude

Votre participation à cette étude est complètement volontaire. Vous pouvez refuser d'y participer, de vous retirer à tout moment sans avoir besoin de justifier votre décision. La décision d'abandonner l'étude n'aura aucune influence sur la suite de vos relations avec le chercheur ou avec l'instance locale qui vous a contacté(e).

### 8. Contact

N'hésitez pas à contacter Annemarie Middelburg à l'Université de Tilburg pour des informations supplémentaires à propos de cette étude ou pour connaître vos droits et vos devoirs. Vous pouvez la joindre au numéro +221 7 77 13 63 70 (téléphone mobile) ou par courrier électronique [m.j.middelburg@tilburguniversity.edu](mailto:m.j.middelburg@tilburguniversity.edu).

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## FORMULAIRE D'AUTORISATION

J'ai été invité(e) à participer à la recherche sur «L'application effective ou non du système international des droits de l'homme en ce qui concerne l'éradication de la Mutilations Génitales Féminines/de l'Excision (MGF/E) au Sénégal». J'ai lu l'information ci-dessus ou quelqu'un me l'a lue. J'ai eu l'occasion de poser des questions sur l'étude, j'ai été suffisamment éclairé(e). J'ai reçu des réponses adéquates. Je participe de mon plein gré à cette étude. Je comprends que j'ai le droit de me retirer de l'entretien à tout moment sans que cela n'influe sur mes rapports ultérieurs avec le chercheur et ou l'instance locale qui m'a contacté(e). J'atteste avoir reçu une copie de ce formulaire d'autorisation après signature.

Nom du participant

Date

Signature du participant

\_\_\_/\_\_\_/\_\_\_ (jour/mois/année)

**Si analphabète**

Nom du témoin indépendant

Date

Signature du témoin

\_\_\_/\_\_\_/\_\_\_ (jour/mois/année)

*(si possible cette personne doit être choisie par le participant sans qu'il n'y ait de lien avec le groupe de recherche)*

Nom du chercheur

Date

Signature du chercheur

\_\_\_/\_\_\_/\_\_\_ (jour/mois/année)



## CONFERENCE INVITATION



Royaume des Pays-Bas

### INVITATION

#### Présentation et discussion

*L'application effective ou non du système international des droits de l'homme en ce qui concerne l'éradication de l'excision au Sénégal*

#### Lundi 27 Janvier

##### Programme

- 15.30h : Arrivée des invités  
16.00h – 17.00h : Présentation des résultats préliminaires de la recherche  
17.00h – 18.00h : Questions et discussion  
18.00h : Réception

Adresse : Residence des Pays-Bas à Dakar, Avenue des Ambassadeurs, Fann Residence







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## ABOUT THE AUTHOR

M.J. (Annemarie) Middelburg was born on the 28<sup>th</sup> of March 1986 in Delft, the Netherlands. She grew up in 's-Gravenzande as the eldest of three children. She graduated from secondary school (Atheneum) in 2004 and started in the same year the bachelor International and European Law at Tilburg University. After her first year, she decided to suspend her studies for one year and she travelled to Australia and New Zealand. When she came back, she continued her studies and obtained her LLB degree in 2008. As a bachelor student, she attended a summer school on 'Human Rights Law, Contemporary Challenges' at North West University in South Africa, she volunteered for development projects in India and Kenya, and she participated in Harvard World Model United Nations (WorldMUN). In 2008, Annemarie did a six-month internship at the political department of the Netherlands Embassy in Israel, Tel Aviv. In 2009, she enrolled for the Master Public International Law and Human Rights at Tilburg University and obtained her LLM degree (*cum laude*) in 2010. She successfully completed the Research Master in Law in 2011 at the same university (*cum laude*). Her Master's thesis 'Piracy in a Legal Context: Prosecution of Pirates Operating off the Somali Coast' was published as a book in 2011.

In October 2011 she was appointed a PhD position by Tilburg Law School, based on her research proposal on the practice of Female Genital Mutilation/Cutting. She joined the International Victimology Institute Tilburg (INTERVICT) and wrote her dissertation under the supervision of prof. dr. M.S. Groenhuijsen, prof. dr. R.M. Letschert and prof. dr. E. Leye. Part of her PhD research was a four-month field study in Senegal. She was awarded grants of McKinsey & Company, Tilburg Law School (Alumni) Fund and the Special Data Collection Requests (BAD) Fund of Tilburg Law School to conduct this field research.

Besides writing her dissertation, she worked on various research projects, including for the European Institute for Gender Equality (EIGE), the United Nations Population Fund (UNFPA), the Scientific Research and Documentation Center (WODC) of the Dutch Ministry of Security and Justice and Victim Support the Netherlands (*Slachtofferhulp Nederland*). She gave presentations at a number of international conferences, including in Barcelona, Venice, Brussels and Paris. She also served as an expert witness during a court case in relation to asylum and FGM/C in the United States.

Besides doing research, Annemarie was involved in educational activities. She taught courses and gave guest lectures on international law, human rights, and FGM/C, both bachelor's and master's level at Tilburg University. She also lectured during summer schools at Tilburg University and Trisakti University (Jakarta, Indonesia). She supervised students at Bachelor and Master level (both law and liberal arts) during the writing of their theses. Moreover, she has been

involved in various other activities, *inter alia*, as the chairperson of the PhD Council of Tilburg Law School, as a member of the Tilburg Organization of PhD Candidates (TOP), as a supervisor of interns at INTERVICT, and as a member of the School of Human Rights Research. Between 2010 and 2015, Annemarie was a board member of the Mukomeze Foundation, which aims to improve the lives of women, and girls who survived sexual violence during the genocide in Rwanda. In March 2015, she started her own business (Middelburg Human Rights Law Consultancy). Visit her website ([www.annemariemiddelburg.com](http://www.annemariemiddelburg.com)) for more information.

## LIST OF PUBLICATIONS

### 2016

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### 2013

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